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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. . . . . .

RICHARD ARNOLD, IV
AND FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. May a Circuit Court of Appeals properly convene itself for rehearing *en banc* under 28 U.S.C. §46(c) where the vote on the petition for rehearing by the ten regular, active judges of the Circuit produces five votes in favor and four votes against rehearing with the tenth judge not voting because of recusal?

2. Whether the convening of the Circuit Court for rehearing *en banc* of a matter which clearly does not involve either securing or maintaining uniformity of decisions within the Circuit or some question of exceptional legal importance constitutes an abuse of the *en banc* power such as to vitiate the judgment rendered by the Circuit Court?

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UNITED STATES OF AMERICA,
Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Richard Arnold, IV and Francis C. Mihalek respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review whether that Circuit Court has complied with 28 U.S.C. §46 (c) by convening an *en banc* court when less than a majority of all the regular, active judges of that Circuit have voted to do so, and to review the *en banc* judgment itself which reverses, on tenuous grounds unrelated to the resolution of any intra-circuit conflict or proceeding of exceptional legal importance, the panel opinion which affirmed district court jury verdicts favorable to Petitioners.

Citations to Opinions Below

The judgments entered by the District Court upon jury verdicts and the memorandum of decision denying motions by Respondent for new trials are printed in Appendices A, B and C hereto, *infra*, at pp. 1a, 1b and 1c, but have not been reported. The judgment of the panel of the Court of Appeals for the Fourth Circuit appears in Appendix D, *infra*, at p. 1d and has been reported at 681 F.2d 186. The judgment entered after rehearing *en banc* is printed in Appendix F, *infra*, at p. 1f but has not yet been reported.

Jurisdiction

The judgment of the panel of the Court of Appeals for the Fourth Circuit was entered on June 4, 1982. Respondent timely filed a petition for rehearing and suggestion for rehearing *en banc*. On December 23, 1982, the Circuit Court entered its Order tentatively granting rehearing *en banc* subject to further consideration and order after argument by the parties. Appendix E, *infra*, at p. 1e. Rehearing *en banc* was held on February 8, 1983 and on July 8, 1983 the Fourth Circuit Court of Appeals entered its judgment, affirming its right to sit *en banc* and reversing *per curiam* by a vote of five to four the earlier panel judgment. The mandate of the circuit court was stayed for thirty days by Order entered July 29, 1983 and this stay was extended for an additional thirty days by Order entered August 23, 1983. This petition for a writ of certiorari is being filed within ninety days after July 8, 1983 and before September 27, 1983, the date through which the stay of the mandate has been ordered by the circuit court.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May a Circuit Court of Appeals properly convene itself for rehearing *en banc* under 28 U.S.C. §46(c) where the vote on the petition for rehearing by the ten regular, active judges of the Circuit produces five votes in favor and four votes against rehearing with the tenth judge not voting because of recusal?

2. Whether the convening of the Circuit Court for rehearing *en banc* of a matter which clearly does not involve either securing or maintaining uniformity of decisions within the Circuit or some question of exceptional legal importance constitutes an abuse of the *en*

banc power such as to vitiate the judgment rendered by the Circuit Court?

Statutes Involved

28 U.S.C. §46(c):

Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.

Rule 35(a) of the Federal Rules of Appellate Procedure:

When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Statement of The Case

This case grows out of the crash of Eastern Air Lines, Inc. (hereinafter "Eastern") flight number 212 on September 11, 1974 near Charlotte, North Carolina. Petitioners Arnold and Mihalek were among the ten survivors of the fiery crash; seventy-two other passengers and crew members were killed. Petitioners filed suit in 1976 in the Western District of North Carolina, invoking jurisdiction under 28 U.S.C. §1332(a)(1) by virtue of diversity of citizenship between them as citizens of South Carolina and Eastern, a citizen of Florida. Their claims against Eastern were consolidated with other survivors' and decedents' actions under the authority of Multi-District Litigation docket number 202.

Petitioners' complaints alleged claims for compensatory damages on account of the severe physical and emotional injuries which they sustained as a consequence of the crash and also sought an award of punitive damages upon the basis of both gross negligence by the pilots and willful conduct by Eastern management in ignoring a dangerous pattern of decreased cockpit discipline, which Petitioners alleged had existed for several years preceding the 212 crash and was the root cause of that tragedy.

Eastern admitted liability for compensatory damages, denied any responsibility for punitive damages and filed a third-party complaint against the United States of America, alleging that the air traffic controllers who were on duty on the morning of September 11, 1974 failed to warn the Eastern pilots of their unauthorized deviation from a normal approach altitude moments before the DC-9 airplane crashed approximately three and one-half miles from the runway at Douglas Municipal Airport. Eastern sought contribution from the government with respect to the amount of money damages to be paid Petitioners for their injuries.

In February 1977, the Aetna Casualty & Surety Company and eighteen other insurance carriers which had contracted to provide liability and physical property damage coverage for the benefit of Eastern filed suit in the Western District of North Carolina (hereinafter referred to as "the Aetna case") against the United States of America and the four individual air traffic controllers who were in the control tower at the time of the crash. That action sought contribution or indemnity with respect to the approximately $22,000,000 which those insurance companies had previously paid in settlements of passenger injury and death claims and for the destruction of the airplane.

On November 1, 1977, the District Court entered an Order consolidating for purposes of discovery and trial the six remaining lawsuits arising out of the crash then pending before the Court, including Petitioners' claims, a wrongful death action (Helen Rae Weston, as Executrix of the Estate of Lewis M. Weston vs. Eastern Airlines, Inc.; hereinafter "Weston") and the Aetna case.[1] The November 1, 1977 Order indicated that the consolidation of trial would be subject to reconsideration after the completion of discovery, upon "timely proper showing." (J.A.[2] I, p. 192).

In a number of pre-trial rulings and memoranda after that initial Order, the District Court reiterated its intention to conduct a single, consolidated trial of all matters arising from the crash. An Order

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[1]Under the terms of the Multi-District Litigation consolidation, this District Court had overseen proceedings in a number of other cases arising out of the crash and, in the spring of 1976, had conducted the trial of several wrongful death claims involving the issues of compensatory and punitive damages. All of those claims were resolved short of jury verdict.

[2]Citations to "J.A. I, II, etc." are to the multi-volume Joint Appendix filed in the Court of Appeals for the Fourth Circuit. Citations to "Appendix A" or other alphabetically-designated appendices refer to the Appendix to this Petition.

of August 24, 1979 states:

> I intend to have only this one more trial on all the fact issues in these cases . . .. I do not intend to have any separate trials later on the issues between the original defendants on the one hand and the airline [sic] controllers on the other. That case will be disposed of in the same factual inquiry.
>
> (J.A. I, p. 233).

Twelve days before trial, Eastern and the plaintiffs in the Aetna case filed motions seeking a severance of the trial of Petitioners' claims from the Aetna case upon the grounds that revelation of the fact of Eastern's liability insurance coverage to the jury might prejudice its defense on the issues of compensatory and punitive damage entitlement. In the exercise of its discretion under F.R.C.P. Rule 42, the District Court determined that any potential prejudice to Eastern was far outweighed by the risk of inconsistent adjudications of the common factual and legal issues present in the consolidated cases, in addition to the practical burden upon parties, witnesses and judicial resources which separate trials would have meant. The request for severance was denied and trial was scheduled to begin on November 5, 1979.

The decision by the District Court not to sever was one of the principal grounds for appeal by Eastern and was specifically addressed by the majority opinion of the panel of the Fourth Circuit Court of Appeals:

> The risks of prejudice and possible confusion as identified by the Appellants were obvious ones which in the exercise of a sound judicial discretion the district court was obliged to weigh. *See Molever vs. Levenson*, 539 F.2d 996 (4th Cir. 1976). Failure carefully to consider them and the alternative procedures advanced by Appellants as a means of avoiding them may well have constituted an abuse of discretion. But the record shows that they were carefully weighed, both in absolute terms and in relation to countervailing considerations also necessary to sound decision.
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> 681 F.2d at 193 (Appendix D, p. 6d).[3]

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[3]The dissent from the panel opinion by Murnaghan, J. agreed that consolidation was "theoretically proper," 681 F.2d at 207, but this view was abandoned

The trial of Petitioners' claims and the Aetna case consumed four weeks. On November 29, 1979, after seventeen hours of deliberation, the jury announced its verdict which awarded Arnold $3,027,500, Mihalek $1,137,500 and the executrix Weston $847,000 in actual damages but which declined to award punitive damages. The air traffic controllers were absolved of any fault in causing the crash, a conclusion which was consistent with the District Court's judgment in favor of the government in that aspect of the Aetna case brought under the Federal Tort Claims Act, 28 U.S.C. §1346(b), in which the court served as trier-of-fact.

On December 8, 1979, Eastern filed motions under F.R.C.P. Rule 59 for new trials in Petitioners' and the Weston cases solely as to the amount of compensatory damages. One of the grounds enumerated in those motions was a concern that certain statements and arguments made by counsel for Petitioners during the trial and particularly during the course of final argument had inflamed the jury and had improperly affected the amount of compensatory damages given Petitioners. Eastern never contended that the amount of the jury awards represented an improper compromise of the compensatory and punitive damage issues, "[T]here is no basis in the record or in the events at the trial to support the theory that the jury's verdict in these cases resulted from a compromise of the actual damages issues and the issue of Eastern's liability for punitive damages." (Eastern's brief in support of motions for new trials; J.A. I, p. 452).

The District Court denied the motions for new trials and entered its judgment upon the jury verdicts in favor of Petitioners and Weston on January 22, 1980. (Appendices A, B and C, *infra*, at pp. 1a, 1b and 1c).[4]

Eastern appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel of that court rendered its judgment on June 4, 1982, affirming by vote of two to one the compensatory damage awards rendered to Petitioners. 681 F.2d 186; (Appendix D, *infra*, at p. 1d). With respect to the contention by Eastern

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by the time the *en banc* judgment of the Circuit Court of Appeals was announced. (Appendix F, *infra*, at p. 12f).

[4]The Weston case is not included in this petition and the judgment of the district court is not printed in the Appendix. Weston was unanimously reversed by the panel of the Fourth Circuit and no petition for rehearing was filed. (Appendix D, at p. 28d).

that the jury's deliberations had been improperly influenced by the argument and comments of Petitioners' counsel, the majority agreed that certain portions of the argument were either technically improper or offensive. Of more critical importance said the majority was whether, in the factual context of this case and the particular circumstances of the questioned arguments, actual prejudice to Eastern could be shown to have occurred. In deciding whether there was a reasonable probability that the conduct complained of improperly influenced the jury in reaching its verdict, the majority concluded:

> The theoretical possibility that either alone or in cumulative effect these [improper arguments] may have exerted some generally improper influence on the jury's deliberations cannot be gainsaid. To find this a reasonable probability, however, would denigrate a jury whose obvious care in deliberating on this case over a period of some seventeen hours strongly belies even the possibility that its reason and its will to obey its mandate could have been subverted by such uninspired flights of invective.
>
> 681 F.2d at 199 (Appendix D, at p. 16d).

Eastern filed a petition for rehearing and suggested that the rehearing be *en banc*. On December 23, 1982, the Court of Appeals entered its Order (Appendix E, *infra*, at p. 1e) , describing the circumstances of the vote on the petition and tentatively granting rehearing *en banc*. Of the ten regular, active judges of the Fourth Circuit, five voted in favor of rehearing, four voted against and one judge did not vote because of recusal.[5]

The hearing *en banc* was held on February 8, 1983. By its *per curiam* judgment entered July 8, 1983, the Circuit Court announced the results of that rehearing:

> [1] the 5-4 vote of the ten circuit judges of the Fourth Circuit constituted a determination by a majority to grant rehearing *en banc* under 28 U.S.C. §46(c); and

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[5]One of the ten regular, active circuit judges who voted against rehearing *en banc* subsequently took senior status after the vote had been taken but before it was announced by the Court. The possible impact of that fact upon the determination of what constitutes a majority sufficient to convene the Circuit Court *en banc* was specifically not considered or decided in the judgment entered by the Fourth Circuit on July 8, 1983. (Appendix F, *infra*, at 4f).

[2] by vote of five to four, the judgments of the District Court in Petitioner's personal injury actions were reversed and remanded for retrial as to the amount of compensatory damages.

The original panel dissent by Circuit Judge Murnaghan became the rationale for the *en banc* reversal on the merits. In strongly-worded dissents, two circuit judges registered disagreement with the method by which the circuit court convened itself *en banc*, respecting both the interpretation of 28 U.S.C. §46(c) and the legitimacy of the exercise in this particular case. (Appendix F at pp. 13f and 23f).

Reasons for Granting the Writ

The proper and consistent implementation of 28 U.S.C. §46(c) by the Circuit Courts of Appeals in the exercise of the *en banc* power is an important matter of federal law which this Court has carefully monitored for over forty years. There presently exists among the circuits a direct decisional conflict concerning what constitutes "a majority of the regular, active judges of the circuit" for purposes of convening an *en banc* court when one or more circuit judges recuses himself from voting on a petition for rehearing *en banc*. In addition, the result reached by the Fourth Circuit Court of Appeals in Petitioners' case is arguably in conflict with this Court's holding in *Shenker vs. Baltimore & Ohio R.R. Co.*, 374 U.S 1 (1963). This Court should grant Petitioners' writ of certiorari in order to provide authoritative guidance to the circuit courts on this recurring aspect of federal procedural law.

POINT I

This Court is the final arbiter of the differing interpretations of 28 U.S.C. §46(c) which are producing irreconcilable decisional conflicts among the circuit courts in the exercise of the *en banc* power.

The genesis of the authority by which the circuit courts of appeals convene for *en banc* hearings and rehearings was this Court's decision in *Textile Mills Securities Corp. vs. Commissioner*, 314 U.S. 326 (1941). In resolving a conflict between the Third and Ninth Circuits, this Court sanctioned utilization of the *en banc* power to provide "more effective judicial administration." 314 U.S. at 335.

Congress codified the *en banc* procedure by enacting, in 1948, 28 U.S.C. §46(c) (hereinafter "§46(c)") in a form which then provided:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court *in banc* is ordered by a majority of the circuit judges of the circuit who are in active service. A court *in banc* shall consist of all active circuit judges of the circuit.

The operative language describing the method by which hearing or rehearing *en banc* may be authorized has not been changed by Congress in the ensuing thirty-five years, save for the addition of the word "regular" before "active service" by amendment in 1963.

On four occasions since the decision in *Textile Mills*, this Court has granted certiorari to resolve specific questions as to the correct interpretation of §46(c).[6] In the *Western Pacific Railroad Case*, *supra*, while stating that §46(c) was a grant of power to a circuit, which "vested [it] with a wide latitude of discretion to decide for itself just how that power shall be exercised." 345 U.S. at 259, this Court specifically reserved unto itself the right to monitor the exercise of that discretion:

> If §46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeal. In the exercise of our "general power to supervise the administration of justice in the federal courts" the responsibility lies with this court to define these requirements and insure their observance.
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> 345 U.S. at 260 (footnote omitted).

The time has come for this Court to once more exercise its general

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[6]*The Western Pacific R.R. Case*, 345 U.S. 247 (1953), construing the 1948 *en banc* statute as a grant of power to the circuit courts to order such hearings and to establish a procedure for the exercise of the power; *Shenker vs. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), holding that the procedure for handling *en banc* petitions is a matter of discretion for the circuit courts; *United States vs. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), holding that a retired circuit judge is ineligible to participate in rehearing *en banc*; and *Moody vs. Albemarle Paper Company*, 417 U.S. 622 (1974), holding that a senior judge who sat on a case initially was ineligible to vote on the question of whether to grant rehearing *en banc*.

supervisory power to consider an aspect of §46(c) which has spawned a conflict of decisional results among the circuit courts. The issue is how a "majority of the circuit judges of the circuit" necessary to order *en banc* rehearing is determined when one or more otherwise regular, active judges recuses himself from voting on a petition. More specifically, should the total number of "regular, active judges of the circuit" from among whom the necessary majority of §46(c) must come be reduced by the non-inclusion of the recused judge?

A. Conflict Between the Fourth Circuit in this Case and the Decision by the Sixth Circuit in *Clark vs. American Broadcasting Company, Inc.*, 684 F.2d 1208 (1982), *cert. denied*, ____ U.S. ____ , 75 L.Ed.2d 792 (No. 82-1288, March 21, 1983).

In Petitioners' case, the Fourth Circuit construed §46(c) as *requiring* the exclusion of the recused circuit judge from the calculation of the majority necessary to order *en banc* rehearing. Thus, affirmative votes by only five of the ten regular, active circuit judges provided the basis for the Order granting the *en banc* rehearing of February 8, 1983. (Appendix E, at p. 2e). The Fourth Circuit premised its authority for this interpretation of §46(c) upon the language of the statute itself. (Appendix F, at pp. 4-6f). There is no rule in the Fourth Circuit concerning the general procedure for voting on a petition for rehearing *en banc* or the impact upon the majority formulation resulting from the recusal of one or more circuit judges.

In a factually identical situation, a contrary result was reached by the Sixth Circuit Court of Appeals in *Clark vs. American Broadcasting Company, Inc., supra.* There, a grant of summary judgment by the district court was reversed by a two to one majority of the panel which heard the appeal. A timely petition for rehearing and suggestion for rehearing *en banc* was filed and the petition was initially granted. Approximately six weeks later, the Sixth Circuit withdrew its earlier Order as having been entered "in error," explaining "that in fact the 5-4 vote (one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute 'a majority of the [10] circuit judges who [were] in regular, active service' within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure."684 F.2d at 1226 (citations omitted). Rehearing *en banc* was thus *denied* despite the affirmative vote of

five of the ten regular, active judges of the Sixth Circuit.

American Broadcasting Co. petitioned for a writ of certiorari. On March 21, 1983 this Court denied that petition, thereby leaving intact the Sixth Circuit's interpretation of the majority requirement of §46(c). Without improperly inferring significance to this Court's denial of that petition, if the decision by the Fourth Circuit to exclude the recused judge from the majority formulation is not corrected by summary reversal at this juncture, Petitioners submit that there presently exists an irreconcilable decisional conflict between the *Clark* case and the result obtained by the Fourth Circuit here. Without resort to any rule of procedure, both circuits interpreted the majority requirement of §46(c) in the context of a 5-4-1 vote and reached diametrically opposite results.

Consistent with its general supervisory power over the administration of justice in the federal system and its demonstrated willingness to interpret §46(c) for the circuit courts and the litigants who appear there, this Court should grant Petitioners' writ of certiorari to address this narrow question of federal law and resolve the decisional conflict which now exists.

B. An Apparent Decisional Conflict in the Interpretation of §46(c) between the Fourth and Ninth Circuits and Decisions of the Second, Third, Seventh and D.C. Circuit Courts; Confusion Concerning the Majority Requirement.

The decision by the Fourth Circuit to proceed with rehearing *en banc* despite less than an absolute numerical majority of that circuit's judges having voted to do so is in conflict with the result reached by the Second, Third, Seventh and D.C. Circuits when those courts were faced with a similar factual situation.

In *Zahn vs. International Paper Company*, 469 F.2d 2033 (2d Cir. 1972), *aff'd on other grounds*, 414 U.S. 291 (1973), a petition for rehearing was considered by the eight regular, active judges of the circuit. One judge disqualified himself and the remaining judges split 4-3 in favor of rehearing. Rehearing was denied for lack of "an affirmative vote 'by a majority of the circuit judges of the circuit who are in regular, active service.' " 469 F.2d at 1040, citing §46(c).[7]

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[7]That literal interpretation of §46(c) was reiterated by the Second Circuit in *Boyd vs. Lefrak Organization*, 517 F.2d 918 (1975).

In addition to the Second Circuit, a clear majority of the other circuit courts of this nation follow a literal reading of the majority requirement of §46(c). *Curtiss-Wright Corp. vs. General Electric Company*, 599 F.2d 1259 (3d Cir. 1979) (rehearing denied with four votes in favor, three against and two judges not participating); *Copper and Brass Fabricators Council, Inc. vs. Department of Treasury*, 679 F.2d 951 (D.C. Cir. 1982), *rehearing denied*, unpublished order number 81-2091 (August 3, 1982) (five votes to rehear, three opposed, two judges not participating); *Porter County Chapter of Isaac Walton League vs. Atomic Energy Commission*, 515 F.2d 513 (7th Cir. 1978) (rehearing denied where four judges voted in favor, three voted against and one took no part), *rev'd on other grounds*, sub nom. *Northern Indiana Public Service Company vs. Porter County Chapter of Isaac Walton League*, 423 U.S. 123 (1975).

The Ninth Circuit apparently convenes to rehear matters *en banc* only when a majority of its regular, active and non-disqualified judges vote to do so. *Ford Motor Company vs. Federal Trade Commission*, 673 F.2d 1008, 1012, n. 1 (1982) (Reinhardt, J. dissenting). The Eighth Circuit has adopted a specific rule defining the constituency of eligible circuit judges from among which the required majority must come.[8]

In the year following *Zahn, supra*, the Judicial Conference of the United States recommended to Congress a change in §46(c) which would "make clear that a majority of judges in regular, active service who are entitled to vote should be sufficient to *en banc* a case." *1973 Report of the Proceedings of the Judicial Conference of the United States* 47. The Conference report acknowledged that as the statute existed in 1973, "if a judge disqualified himself there must still be a majority of the entire membership voting for *en banc* sitting." *Id.* at 47. No congressional action was taken to implement that suggested modification of §46(c).

Since 1973, Congress has seen fit to twice amend §46(c), Pub.L. 95-486, 92 Stat. 1629 (1978) and Pub.L. 97-164, 96 Stat. 25 (1982),

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[8]Rule 16(a) of the U.S. Court of Appeals for the Eighth Circuit (1981) provides, "[A] majority of the judges . . . in regular, active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may order a . . . rehearing en banc . . .." Petitioners are informed that this Rule grew out of a situation in the Eighth Circuit in which a regular, active circuit judge was due to illness occasionally prevented from taking an active role in the affairs of the court.

but on both occasions nothing was done to alter the language requiring a majority of all the regular, active circuit judges to order rehearing *en banc*.[9] This Court has previously described §46(c) as being "not without ambiguity." *Western Pacific R.R. Case, supra,* at 267. However, the legislative history reflects satisfaction by Congress with that specific portion of the statute which, in straightforward terms, provides that rehearing *en banc* may not be had unless a numerical majority of *all* regular, active circuit judges votes to do so. "There is nothing in the history of the legislation to indicate that these words should be understood to mean anything else than what they say." *American-Foreign S.S. Corp., supra,* 363 U.S. at 688-89 (in that instance, this Court interpreted an "active" judge as being "a judge who has not retired from regular, active service").

Five circuit courts of this nation have read §46(c) in cases coming before them and have consistently concluded that a numerical majority derived from all the regular, active judges of the circuit is a prerequisite to the valid exercise of the *en banc* power. The Ninth Circuit would seem to permit the exclusion of disqualified or abstaining circuit judges from the process by which the *en banc* court is convened. By its decision in Petitioners' case, the Fourth Circuit clearly would require such an approach.

Surely the discretion vested in the circuits to determine for themselves the format for the exercise of the *en banc* power is not so broad as to permit such diametrically opposed interpretations of §46(c) to co-exist in a unitary system of federal justice. Had Petitioners' case arisen in the Second, Third, Sixth, Seventh, or D.C. Circuits and a similar 5-4-1 vote on the petition for rehearing *en banc* occurred, under the decisional policy of those circuits no rehearing would have been allowed and Petitioners would still have the benefit of their jury verdicts. The Fourth Circuit has read the identical federal statute and concluded that it was authorized to proceed with rehearing *en banc*, a process by which the ultimate reversal of the panel opinion was achieved.

Such a disparity of interpretation of §46(c) will inevitably produce for many other litigants in many other cases a confusing and

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[9]The legislative prerogative for amending §46(c) has been acknowledged by this Court. "[I]ndeed, the Judicial Conference of the United States has approved suggested legislative changes that would provide such an exception, and a bill to amend the statute has been introduced in Congress, but this only serves to emphasize that if the statute is to be changed, it is for Congress, not us, to change it." *American-Foreign S.S. Corp., supra,* 363 U.S. at 690-91.

uneven application of the standard by which their verdicts may be affected by the *en banc* power of the circuit courts of this nation. Such a result runs contrary to the very purpose of the *en banc* power as originally contemplated by this Court:

> The principal utility of determinations by the courts of appeals en banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . ..
>
> *American-Foreign S.S. Corp., supra,* at 689-90 (quoting from Maris, *Hearings and Rehearings in Banc,* 14 F.R.D. 91, 96 (1954).

The disparity in interpretation of §46(c) can only be resolved by this Court's exercise of the general supervisory power in the vehicle of Petitioners' case.

C. Conflict Between the Decision by the Fourth Circuit Here and This Court's Holding in *Shenker vs. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963).*

A third and equally important reason why this Court should grant Petitioners' writ is the fact that this Court may very well have previously decided that §46(c) requires an absolute numerical majority of circuit judges to grant rehearing *en banc* and thus, the action by the Fourth Circuit in proceeding without such a majority would be in direct conflict with the authority of this Court. Circuit Judge Widener, writing in dissent from the action taken by his fellow judges, concluded that the holding in *Shenker* is irreconcilably at odds with the result reached by the Fourth Circuit:

> In *Shenker*, the Supreme Court affirmed a decision of the Third Circuit which required an affirmative vote of an absolute majority of the active members of the court and which did not require each member of the court to vote on petitions for rehearing en banc. At the time Shenker filed his petition for rehearing en banc, eight judges were in active service. Four of the eight voted to rehear the case; two voted not to rehear; and two abstained for reasons that do not appear either in the Supreme Court's or the Court of Appeals' opinion. On this vote,

the Third Circuit denied the petition for rehearing en banc and the Supreme Court found no error in the denial.

* * * *

In the first place, so far as I can ascertain, there was no rule in the Third Circuit except a near literal copying of the words of the statute. It was merely a practice of that circuit which was given effect by decision in the *Shenker* case. Thus, the decision of the Third Circuit was that an absolute majority was required, and this was affirmed by the Supreme Court. Both the holding of the Third Circuit and the Supreme Court are entirely consistent with the wording of the statute. . . . [T]he fact situation presented to the Supreme Court in *Shenker* is the same as presented to us here. Since the *Shenker* case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does, and it did not do so, I suggest that, because the adoption of the majority view here would have changed the result of the *Shenker* case, the Supreme Court has rejected the position the majority now embraces.

> Appendix F at pp. 15-16f (footnote omitted; this conclusion was shared by Phillips, J who wrote a separate, compelling dissent, Appendix F at p. 23f).

This Court is fully cognizant of what its decision in *Shenker* represents and the implications of that holding for the purpose of deciding whether the Fourth Circuit has either ignored or misunderstood that decision. In Petitioners' view, all the reasonable inferences of the factual setting of the denial of *en banc* rehearing by the Third Circuit and this Court's affirmation of that result support a conclusion that *Shenker* expressly decided that §46(c) requires an absolute majority of circuit judges to order *en banc* rehearing, regardless of how many of the judges may choose not to vote on a particular petition.

> It [§46(c)] vests in the court the power to order hearings in banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing in banc. The court

> is left free to devise its own administrative means *whereby a majority may order such a hearing.*
>
> *374 U.S. at 4-5, citing Western Pacific R.R. Case, supra,* 345 U.S. at 250 (emphasis added).

Petitioners contend that this excerpt from *Shenker* means that a litigant may not be heard to complain if his petition for rehearing simply fails to garner support from a majority of *all* the regular, active circuit judges, even if more than half of those who *do* vote favor rehearing. Simply put, §46(c) does not require a majority of circuit judges to vote *against* a petition for rehearing for it to be denied.

In reaching its decision in *Shenker*, the Third Circuit relied upon a literal reading of §46(c) as its rationale for requiring an absolute majority. With no different starting point, the Fourth Circuit has concluded -- by excluding for purposes of computing that majority the recused Judge Ervin, who was in all other respects a regular, active judge of the circuit -- that less than an absolute majority is sufficient to convene for *en banc* rehearing. Those two views of the same statutory provision simply cannot be harmonized.

If *Shenker* in fact represents this Court's answer in the negative to the question raised by Petitioners at the threshold of their petition (see p. 2, *supra*), then the appropriate action to be taken by this Court is the granting of certiorari and summary reversal of the *en banc* judgment of the Fourth Circuit Court of Appeals.

POINT II

In Petitioners' case, the Fourth Circuit Court of Appeals abused the limited legitimate purposes of the *en banc* rehearing power to substitute the decision of a tenuous majority for that of the panel judgment, for reasons unrelated to the effective administration of the law or policy of this circuit.

The other statutory provision affecting exercise of the *en banc* power by the circuit court is Federal Rule of Appellate Procedure 35. Subsection (a) states:

> When Hearing or Rehearing *en Banc* Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceedings

> be heard or reheard by the court of appeals *en banc*. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

The rule reiterates the majority requirement of §46(c) and sets out a criteria for identification of those special cases which warrant utilization of the *en banc* procedure. Because it compels the time and attention of every circuit judge, the *en banc* rehearing process is "not favored,"[10] a pragmatic restriction long recognized by this Court: "*En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the Circuit." *American-Foreign S.S. Corp., supra*, 363 U.S. at 689. The policy underlying the *en banc* rehearing statute is "that the active circuit judges shall determine the major doctrinal trends of the future for their court." *Id.*, at 690. There is now general agreement among the circuits that the "extraordinary" cases meriting *en banc* treatment are those which involve legal issues likely to impact upon many other cases -- i.e., those of real significance to the legal process as well as to the particular litigants involved. *Church of Scientology of California v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) *en banc* (Robinson, J., dissenting). In short, the terms of the procedural rule itself, as well as the policy considerations affecting invocation of the *en banc* power make clear that it is not intended for monitoring panel decision-making or reconsideration of cases merely to correct what several circuit judges may feel is either an unjust or questionable panel decision.

With these considerations in mind, Petitioners contend that the *en banc* judgment rendered below represents a capricious misuse of the power, whereby the uninformed will of a narrow five-four

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[10]The degree to which *en banc* rehearings are disfavored is illustrated by statistics for fiscal 1980. In that year, 23,200 appeals were filed in the Federal Courts of Appeals; 10,598 were orally heard or submitted on briefs. Of these, only 65 cases were heard *en banc*. 1980 Annual Report of the Director, Administrative Office of the United States Courts at 43, Table 1; 49, Table 7, cited in *Church of Scientology of California v. Foley*, 640 F.2d 1335, 1341 n. 48 (D.C. Cir. 1979), *en banc* (Robinson, J., dissenting).

majority has imposed itself to overturn the panel decision for reasons most obviously related to the majority's perception of how the appeal should be decided. Nothing contained in the opinion of the *en banc* court suggests that this decision will affect the administration and development of the law of the Fourth Circuit, or that the holding will have any ongoing pertinence to other cases which may hereafter arise in the circuit. Circuit Judge Phillips, who authored the panel opinion and dissented from the *en banc* decision, accurately characterized the nature and effect of the action taken by his fellow judges:

> It obviously resolves no intra-circuit conflict of decision. It neither announces, abandons, nor clarifies any legal principle that might bear upon general "doctrinal trends" in circuit law. It lays down no precedent likely to provide helpful guidance either to the district courts in exercising discretion or to this Court in reviewing exercises of discretion in future cases of general comparability. It deals with no controversy of such general public importance, as opposed to public curiosity, that full-court imprimatur is desirable simply to encourage greater public confidence in the end result. It simply substitutes the judgment of a one-vote majority of the nine-member *en banc* court for that of a one-vote majority of a three-member panel on purely judgmental questions of trial court discretion not likely ever to recur in even generally comparable form. Raw power obviously exists in the larger majority to do this; the real question is the propriety of the power's exercise in this or other cases of the general type.
>
> Appendix F, at pp. 28-29f.

A review of the opinion of the *en banc* majority confirms this assessment and points up the tenuous, unfortunate quality of judicial prerogative which is being indulged. Five circuit judges agreed that there was "substantial error" (Appendix F at p. 10f) in the denial by the district court of the pre-trial motion to sever Petitioners' case from the Aetna case. In his dissent from the panel judgment, Circuit Judge Murnaghan had agreed that consolidation was "theoretically proper" (Appendix D, at p. 30d) but apparently changed his mind on this issue by the time the *en banc* rehearing was held. The discretionary decision by the district court not to sever

the related cases is the *only* matter upon which the *en banc* majority reached a five-judge concensus. On the critical issue linking the allegedly improper jury arguments by Petitioners' counsel to the size of the compensatory verdicts, Circuit Judge Widener (in the five-judge majority on the consolidation question) "would affirm the judgement of the district court because of lack of contemporaneous objections and motions for mistrial." (Appendix F at pp. 13-14f)

There was at best then a "makeshift majority" in support of reversing the panel judgment because of a different view of the propriety of the district court's decision not to sever the trials of Petitioners' claims from the Aetna case. On the face of the *en banc* majority opinion, that is the only articulated basis for the reversal and remand directed by the circuit court. Any pretense that the consolidation issue in this appeal is either of exceptional legal importance or likely to affect future doctrinal trends within the Fourth Circuit is dispelled by the *en banc* majority's own treatment of the question:

> There is no need for us to announce a rule of universal applicability, imposing as an absolute necessity the separate trial of every case which is a candidate for consolidation if consolidation results in revelation to the jury of insurance coverage for a defendant. Nevertheless, looking at the facts and circumstances of the particular case, we are satisfied that knowledge of Eastern's insurance coverage, and awareness of the approximate quantum of recovery for virtually every other crash victim, implanted in the minds of the jury resulted in prejudice, almost surely prejudice from the outset and certainly prejudice after the trial had wended its way to conclusion.
>
> Appendix F at p. 11f
> (footnote omitted).

This heavy-handed, simplistic rationalization for achieving what five circuit judges apparently felt was the "right" result in this particular appeal underscores Petitioners' contention that the *en banc* power was abused in this instance by the circuit court.

The legal issue presented by Eastern's appeal was the possible abuse of discretion by the district court in its denial of the motions for new trials as to the amount of compensatory damages. The principal contention of the appeal was that improper argument by Peti-

tioners' counsel had influenced the jury to award excessive compensatory damages. After conducting a painstaking, principled analysis of over 2,000 pages of the record on appeal, the panel majority concluded not only was there no showing of abuse of discretion by the district court, but that the claim concerning the size of the verdicts and the impact of the questioned jury arguments upon those verdicts was simply not borne out by the events of the trial.

Recognizing the inherently limited scope of appellate review of trial court discretionary rulings, the panel majority focused its analysis on the totality of circumstances surrounding the statements made by Petitioners' counsel as the only legitimate method for deciding whether there was a reasonable probability that the verdicts were the result of some improper influence. *See, City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F. 2d 749, 756 (6th Cir. 1980); Appendix D at p. 13-14d.

The factors which the panel majority found persuasive in its determination that prejudicial influence was highly unlikely included, *inter alia:*

[1] the fact that Eastern had admitted liability for compensatory damages and the compelling nature of Petitioners' injuries made substantial verdicts a certainty;

[2] strong, credible evidence was offered in support of the imposition of punitive damages (Appendix D at p. 3d) yet no award was made on that issue;

[3] the district court gave frequent, general cautionary instructions to the jury throughout the course of the trial and specifically addressed itself to the only instance of jury argument to which contemporaneous objection was made by Eastern's trial counsel; and

[4] perhaps most importantly, that *no contemporaneous objections* or motions for mistrial were made by defense counsel to the very arguments which Eastern contended on appeal were the source of the excessive verdicts.

See, Appendix D at pp. 14-16d; Appendix F at pp. 34-35f.

The cumulative effect of these trial circumstances and the real issues facing the jury totally undermine the contention that the

damage awards reflected an improper enhancement resulting from statements by Petitioners' counsel. Of equal importance to the panel majority's conclusion in this respect was the probing analysis of the trial record which it performed -- an essential element of any serious search for a causal connection between alleged prejudicial trial conduct and the resulting verdicts.

The panel dissent by Circuit Judge Murnaghan which was adopted as the rationale for the *en banc* decision never attempted to trace the potential harm of the questioned jury arguments into the verdicts themselves. That dissent, and now the *en banc* majority, contented itself with a scathing condemnation of the conduct of Petitioners' counsel as the basis for the conclusion that the verdicts should be reversed, without ever coming to grips with the more critical inquiry whether that conduct in fact prejudiced Eastern's right to a fair trial. The dissent by Circuit Judge Phillips from the *en banc* majority decision describes it well:

> The *en banc* decision is -- so far as can be discerned from what is said in the two opinions -- rested entirely upon a blunt perception that the misconduct of counsel here is so bad that review need not go beyond a simple recognition of its particular degree of impropriety -- with remand for new trial dictated as a matter of course because of the degree perceived and the need to deter repetitions. No attempt is made to assess whether, under a careful record review, it must further be assumed that *actual* prejudice to Eastern probably resulted from the misconduct.
>
> Appendix F, p. 32f;
> (emphasis in original).

There was no comparable review of the record on appeal undertaken by either the panel dissent or the *en banc* majority. The language and brevity of the dissent itself demonstrate clearly that the perceived egregious conduct by Petitioners' counsel was thought to be sufficient justification to warrant reversal, without undertaking any detailed review of the actual probability of prejudice. The premise for the observation by the dissent that the district court had "lost control of the situation," (see Appendix D at p. 37d, n. 3; Murnaghan, J., dissenting) rests upon its interpretation of the words of a pretrial memorandum (see p. 5, *supra.*) which the dissent considered an open invitation to Petitioners' counsel to perpetrate abuses at trial with the certain knowledge that the district court had

precluded itself from declaring a mistrial, regardless of their transgressions. That perception not only defies logic and a commonsense reading of the pretrial memorandum, but ignores as well the documented proof that the district court scrupulously supervised the conduct of *all* counsel during the trial and effectively shielded the jury from the extremes of advocacy which the trial of such important and emotional issues inevitably produces. (Appendix D, p. 16d, n. 11 and p. 17d, n. 13; *See also* Appendix F at p. 32f, n. 10).

The particular context of the tragic crash which gave rise to Petitioners' claims and the events of the trial of those claims in November 1979, create a unique backdrop for this appeal -- one which is unlikely ever to be duplicated. The language of the decision by the *en banc* court makes it clear that consideration of the issues in this appeal by the full court was not necessary to secure or maintain uniformity of decisions within the Fourth Circuit. There is nothing contained in this highly fact-specific, unexceptional diversity case to warrant the investment of time and resources compelled by convening of the *en banc* circuit court. The only possible explanation for the decision to rehear *en banc* and the ensuing reversal of the panel judgment was a presumably honest, albeit unarticulated, difference of perspective by five judges as to what should be the outcome of the appeal. Without undertaking any responsible review of the unique facts of this case, the verdicts were overturned by the thinnest of a majority of circuit judges.

Petitioners urge upon this honorable Court the conclusion that the action taken by the Fourth Circuit Court of Appeals in reversing the panel judgment is not only substantively incorrect, but represents as well a misuse of the important *en banc* rehearing power which this Court should not brook.

Conclusion

By its decision to proceed with rehearing *en banc* in this case, the Fourth Circuit Court of Appeals has placed itself squarely in conflict with the interpretation of the majority requirement of 28 U.S.C. §46(c) which is applied in the Second, Third, Sixth, Seventh and D.C. Circuits. Two other circuits follow policies in connection with *en banc* rehearings which lend further uncertainty as to the correct interpretation of this federal statute. This unsettled state of affairs among the circuit courts and the importance of the *en banc* rehearing process to the adjudication of controversies in the federal

system warrant exercise of the supervisory power of this Court and granting of the petition of certiorari which Petitioners seek.

As a corollary to the resolution of the question concerning §46(c), this Court should carefully scrutinize the particular exercise of the *en banc* power in this appeal. The proceedings below offer an excellent opportunity for this Court to provide guidance to the circuit courts concerning the limited proper use of the *en banc* authority and to sanction the misuse of that power committed here by the Fourth Circuit.

Petitioners therefore respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted.

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DATED: September 26, 1983

APPENDIX A

Judgment of the District Court

United States District Court
W.D. North Carolina
Charlotte Division

Jan. 22, 1980

RICHARD ARNOLD, IV.,
Plaintiff,

v.

EASTERN AIR LINES, INC.,
Defendant and
Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant.

No. C-C-76-108

JUDGMENT

McMillan, District Judge.

THIS CAUSE was tried to a jury at the November 5-29, 1979, term of civil jury court for the Western District of North Carolina, Charlotte Division. The defendant admitted liability for compensatory damages and the following issues were submitted to the jury and answered by the jury in the case of the plaintiff Arnold as follows:

1. Was the plaintiff Richard Arnold, IV., injured and damaged by negligence of the defendant Eastern Air Lines, Inc.?

Answer: Yes. [As instructed by the court and for purposes of a complete verdict only.]

2. What amount, if any, is the plaintiff Richard Arnold,

IV., entitled to recover of the defendant Eastern as compensatory damages?

Answer: $3,027,500.00.

7. In your discretion, what amount of punitive damages, if any, should be awarded?

Answer: No.

8. How should the above amount of punitive damages be divided among the plaintiffs?

To the plaintiff Arnold: No.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff Richard Arnold, IV., have and recover of defendant Eastern Air Lines, Inc., the sum of Three Million Twenty-Seven Thousand Five Hundred and No/100 Dollars ($3,027,500.00).

2. That this judgment for the above amount is entered *nunc pro tunc* as of November 29, 1979, the date of the verdict.

3. That plaintiff recover interest on this principal sum at the rate of six percent (6%) per annum computed from and after November 29, 1979.

4. That the court has considered (a) the motion by defendant Eastern for a partial new trial on the issue of actual damages and (b) the motion of the plaintiff for a conditional new trial on the issue of punitive damages. The court, in its discretion and based upon all the evidence and the circumstances surrounding this trial known to the court, and also for reasons briefly, though not by any means completely, summarized in the accompanying memorandum of decision, denies Eastern's motion for a partial new trial on the issue of compensatory damages only.

As to plaintiff's motion for a new trial on punitive damages, the court orders that if as a result of an appeal there should be a new trial on the question of compensatory damages, then, but only in that event, there shall also be a new trial on the issue of punitive damages. In other words, this is a conditional order granting a new trial on punitive damages *nunc pro tunc* if a new trial on actual damages is to be had.

5. The usual and customary costs will be assessed against the

defendant on those items attributable to proof of actual damages, and against the plaintiff on those items attributable to proof of punitive damages. However, computation and assessment of these costs can await the outcome of the appeal, if any, from this judgment; if a new trial is ordered, this order respecting costs will, of course, be modified in accordance with the ultimate outcome of the various issues.

APPENDIX B

Judgment of the District Court

United States District Court
W.D. North Carolina
Charlotte Division

Jan. 22, 1980

FRANCIS C. MIHALEK,

Plaintiff,

v.

EASTERN AIR LINES, INC.,

Defendant and
Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant.

C-C-76-249

JUDGMENT

McMillan District Judge.

THIS CAUSE was tried to a jury at the November 5-29, 1979, term of civil jury court for the Western District of North Carolina, Charlotte Division. The defendant admitted liability for compensatory damages and the following issues were submitted to the jury and answered by the jury in the case of the plaintiff Mihalek as follows:

3. Was the plaintiff Francis C. Mihalek injured and damaged by negligence of the defendant Eastern Air Lines, Inc.?

Answer: Yes. [As instructed by the court and for purposes of a complete verdict only.]

4. What amount, if any, is the plaintiff Francis C. Mihalek entitled to recover of the defendant Eastern as compensatory

damages?

Answer: $1,137,500.00.

7. In your discretion, what amount of punitive damages, if any, should be awarded?

Answer: No.

8. How should the above amount of punitive damages be divided among the plaintiffs?

To the plaintiff Mihalek: No.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff Francis C. Mihalek have and recover of defendant Eastern Air Lines, Inc., the sum of One Million One Hundred Thirty-Seven Thousand Five Hundred and No/100 Dollars ($1,137,500.00).

2. That this judgment for the above amount is entered *nunc pro tunc* as of November 29, 1979, the date of the verdict.

3. That plaintiff recover interest on this principal sum at the rate of six percent (6%) per annum computed from and after November 29, 1979.

4. That the court has considered (a) the motion by defendant Eastern for a partial new trial on the issue of actual damages and (b) the motion of the plaintiff for a conditional new trial on the issue of punitive damages. The court, in its discretion and based upon all the evidence and the circumstances surrounding this trial known to the court, and also for reasons briefly, through not by any means completely, summarized in the accompanying memorandum of decision, denies Eastern's motion for a partial new trial on the issue of compensatory damages only.

As to plaintiff's motion for a new trial on punitive damages, the court orders that if as a result of an appeal there should be a new trial on the question of compensatory damages, then, but only in that event, there shall also be a new trial on the issue of punitive damages. In other words, this is a conditional order granting a new trial on punitive damages *nunc pro tunc* if a new trial on actual damages is to be had.

5. The usual and customary costs will be assessed against the

defendant on those items attributable to proof of actual damages, and against the plaintiff on those items attributable to proof of punitive damages. However, computation and assessment of these costs can await the outcome of the appeal, if any, from this judgment; if a new trial is ordered, this order respecting costs will, of course, be modified in accordance with the ultimate outcome of the various issues.

APPENDIX C

Opinion of District Court

United States District Court
W.D. North Carolina
Charlotte Division

Jan. 22, 1980

C-C-76-108
RICHARD ARNOLD, IV.,
Plaintiff,

v.

EASTERN AIR LINES, INC.,
Defendant.

C-C-76-249
FRANCIS C. MIHALEK,
Plaintiff,

v.

EASTERN AIR LINES, INC.,
Defendant.

C-C-77-006
HELEN RAE WESTON, as Executrix
of the Estate of Lewis M. Weston, deceased,
Plaintiff,

v.

EASTERN AIR LINES, INC.,
Defendant.

MEMORANDUM OF DECISION

McMillan, District Judge.

These cases are before the court on various post-verdict motions: (1) defendant's motion to set aside the verdict and for a new trial

on compensatory damages only in each of the three cases; (2) plaintiff Arnold's conditional motion for a new trial on the question of punitive damages; (3) plaintiffs' and defendant's motions regarding the taxing of costs; (4) plaintiff Mihalek's and plaintiff Weston's motions for pre-judgment interest; and (5) plaintiffs' motions for an order requiring a cash appeal bond.

MOTIONS TO SET ASIDE THE VERDICT AND FOR NEW TRIAL

Eastern's motion to set aside the verdict in each case rests (1) on the alleged excessiveness of the damage award and (2) on certain prejudicial errors allegedly committed by the court during the trial.

A. Assertions of Error.—With one exception to be discussed below, the court is of the opinion that defendant's various assertions of error are without merit.

1. Consolidation of the passenger suits with the Aetna suit against the United States and Eastern's third-party complaint.

The court again concludes that there was no error and no prejudice to Eastern Air Lines in consolidating these cases for trial, for the reasons stated in the court's order of November 1, 1979, denying separate trials.

2. Admission into evidence of photographs and eyewitness testimony about the crash scene.

The court took great care to exclude and did exclude photographs and proffered testimony on the crash scene that was not made competent by testimony as to what the plaintiffs (in contrast with other witnesses) saw and experienced. The photographs admitted into evidence were in no way inflammatory and prejudicial.

3. Newspaper coverage.

The jury was adequately instructed several times in this regard. The court did not tell the jury that it was proper for them to read or to consider press accounts of the case. There is no indication that press accounts of the trial influenced the verdicts. Eastern's challenge to the instruction is somewhat ironic; the first act by any lawyer which put possibly prejudicial information in the minds of the jury through the press was by one of Eastern's counsel who "leaked" to a reporter on the morning the trial began the information that the United States had made a settlement with the two flight

attendants, whose claim was based upon alleged negligence of the air traffic controllers.

4. Evidence of subsequent accidents.

This evidence was properly admitted in the trial of the punitive damage question. Since defendant has subsequently argued in its memorandum filed December 14, 1980, that the evidence on the punitive damage question cannot be considered to have influenced the amount of the compensatory award, the court is unable to conceive in any event how defendant can simultaneously maintain that it was prejudiced by this evidence.

5. Improper comments by counsel.

Comments by counsel where improper were cured by instructions of the court.

All the above errors were asserted as grounds for new trial in all three cases.

6. Instructions regarding pain and suffering in the Weston case.

Defendant asserts that the court erred in instructing the jury on the issue of decedent's pain and suffering as an element of recoverable damages in the Weston case. The court is now persuaded that technical error was committed in this one regard. There was apparently no evidence from which the jury could infer that decedent was conscious for even an instant after impact. There should therefore be a new trial in the Weston case unless plaintiff agrees to a remittitur in the amount of $50,000, which amount the court believes is reasonable and adequate to offset the possibly prejudicial impact of the court's erroneous instruction.

B. Excessiveness of the Award.—There remains the question whether the damage awards should be set aside in each case as clearly excessive, shocking to the conscience or produced by passion and prejudice.

The damage awards in each case are for large sums of money. The court is of the opinion, however, that there is nothing "excessive" or "shocking" in the awards such as should move a court to set aside the considered verdict of the jury. This opinion is based, in the first place, on the evidence of damages adduced at trial. Only the jury, who actually heard and saw all the lengthy and graphic evidence of damages, can fully appreciate its impact. I will not attempt to re-create nor even outline that impact, and will refer to it only as follows:

In the Weston case, plaintiff was awarded in damages, for the

wrongful death of her husband, $847,000 under a North Carolina statute which provides:

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

N.C. Gen. Stat. §20A-18-2(b) (emphasis added).

In the Mihalek case, the jury was entitled to conclude from the evidence that plaintiff Mihalek, as a result of the accident, has suffered a lifetime pyschic [sic] disability, and that as a result of this disability, a once confident, ambitious, and highly competent business executive has been reduced to passivity, inactivity and despair. The jury evidently accepted plaintiff's theory and evidence of psychic injury; starting from that premise, there is nothing excessive or shocking in the award of $1.1 million that, in addition to other demonstrated elements of damage, compensates Mr. Mihalek for the lifetime loss of what he was as a person before the accident occurred.

Finally, Mr. Arnold's account of the pain and suffering resulting from the burns sustained in the crash of Eastern Flight 212 and the ensuing treatment, though dramatic, was credible and without parallel in the experience of the trial judge, which covers twelve years on the bench and twenty-three years as a trial lawyer trying numerous injury cases. This pain and suffering, in combination with the lifetime disfigurement and disability proved at trial, and other proved damages, renders that $3 million award neither excessive or shocking.

In the second place, it is a jury verdict we are considering. The jury, not the judge, is the agency under our constitutional system which "makes the market" in cases like this; the jury is not bound by the appraisals made for purposes of compromise settlement, nor by the "average" of about a third of a million dollars per person, which, under the evidence, had been paid four to six years ago in settlement of some seventy-odd other claims arising out of this catastrophe. The size of the awards is not excessive when viewed in the light of recent personal injury verdicts in jurisdictions including North Carolina of which the court is aware; of the current rate of inflation, and of previous settlements of some individual suits for far more than $1 million as long as four years ago for wrongful death claims arising out of the flight of Eastern 212.

There is also a motion by plaintiffs for a new trial on the issues of punitive damages in the event the compensatory damage award is set aside. This motion rests on three grounds: allegedly improper appeals by defense counsel to sympathy and emotion; disregard by the jury of the court's instructions; and new evidence. The first and second are without support in the record and are without merit. The new evidence asserted as the third ground relates to the recent attempted landing of Eastern Air Lines Flight 623 at Brockenborough Airport on Sunday, November 25, 1979. The incident occurred during the trial and before the present cases were sent to the jury but did not come to public attention until after the jury returned with its verdict. Press reports indicate that the crew of southbound Flight 623 mistook a small general aviation facility north of Charlotte for the much larger Douglas Municipal Airport several miles to the southwest, and was within some 600 feet of landing on its short, thinly paved runway when warned off by Charlotte air traffic control. Plaintiffs contend that the circumstances surrounding the Brockenborough incident led to show that cockpit discipline remains a problem at Eastern despite defendant's assertions to the contrary.

It is possible that evidence of this near-catastrophe would be competent in a new trial; the court, however, is of the opinion that this evidence, standing alone, is insufficient to warrant retrial of an issue that already has been the subject of extensive proof and argument and lengthy deliberation by a properly instructed jury. In any event, it is unnecessary to decide plaintiffs' motion since the court today concludes that the damage verdicts should not be set aside.

The court is of the view, however, that if a new trial is ordered on appeal, such new trial should be on all questions and not limited simply to the amount of compensatory damages. The court arrives at this conclusion without joy. Substantial court time has been twice consumed in trial of the punitive damages question. While plaintiffs made a strong case for punitive damages, the jury decision not to award punitive damages is supportable on the evidence. The court believes, however, that if a new trial is ordered pursuant to appeal, then it would be unjust to re-try the cases solely on the issue of compensatory damages. This is based on the court's view that one probable reason for the large verdicts is that the compensatory award includes some element of disguised punitive damages or represents a compromise in which one or more persons on the jury traded their convictions on the punitive damage question for an increase in compensatory damages. There is no evidence before the court on the jury's discussions in this regard. The court's surmise is based on the strength of the case for punitive damages and the length of time the jury apparently devoted to deliberating the question of liability for punitive damages. If anything improperly influenced the amount of damages awarded, the court views the evidence of reckless, inattentive and wanton misconduct by the crew (and the amazing approval displayed by Eastern's President and its flight safety chiefs for routine disregard by flight crews of the warning signals they were getting from altimeters and terrain warning indicators and other safety devices installed for their use) as being much more likely causative factors than any of the various errors alleged by defendant. Indeed, at hearing on the post-verdict motions, counsel for defendant offered just such explanation of the size of the verdict. Now that it has become apparent a compromise verdict would warrant and might even compel a new trial on all issues or none, defendant has abandoned this view of the verdict. In its memorandum filed January 14, 1980, defendant contends that "the character of Eastern Air Lines' conduct did not bear upon the amount of actual damages due to Plaintiffs as compensation for injury" and that "there is no substantial indication that the verdicts were the result of a com-

promise." If there is a substantial probability that the verdict was such a compromise, re-trial of the punitive damage issue along with the compensatory damages would appear proper under controlling decisions in this circuit and the weight of authority in other jurisdictions. *See Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F. 2d 839, 846 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976); 6A Moore's Federal Practice §59.06, at 81-84.

COSTS

The court is of the opinion that costs should be apportioned between the compensatory and punitive phases of the proceedings, with Eastern recovering its costs in defending punitive liability and plaintiffs recovering their costs in prosecuting their claims for compensation.

INTEREST

A. Pre-verdict Interest.

Counsel for plaintiffs have moved for an order assessing interest against the defendant from the date of the injuries or, in the alternative, from the date of the first pleading filed by defendant admitting liability for compensatory damages.

Plaintiffs should not receive pre-verdict interest. It is clear both from the authority cited in support of the motion and from controlling decisions in North Carolina that pre-judgment interest on some determinable amount is recoverable, but only as an element of damages. *See, e.g., Yancey v. N.C. State Highway Commission*, 221 N.C. 185 (1942). In order to recover, plaintiffs must plead their right to pre-judgment interest and submit an issue thereon to the jury. Had plaintiffs requested an appropriate instruction, the court could have permitted the jury to award pre-judgment interest on those elements of damage that were readily and precisely determinable prior to trial. Plaintiffs did not do so. They cannot raise the question for the first time now.

In addition, adding pre-judgment interest would be inequitable. The chief factor delaying trial on the amount of compensatory damages was the plaintiffs' pursuit of their punitive damage claim. In view of the high rate of inflation in recent years, it is unlikely that a jury in 1976 or 1977 would have returned verdicts in the amounts in fact awarded in 1979. Thus there is already an "interest" element in the awards, and to add on pre-judgment interest to these amounts would, in a real sense, constitute a double recovery.

B. Post-verdict Interest.

In view of the large sums involved, plaintiffs should not be prejudiced by the delay in the entry of judgment necessitated by consideration of the post-verdict motions.

Judgment will therefore be entered nunc pro tunc as of the date of the verdicts and the legal rate of interest calculated from that date pursuant to 28 U.S.C. §1961.

C. Supersedeas Bond.

Under Rule 62 of the Federal Rules of Civil Procedure, a supersedeas bond is the normal requirement to stay execution pending appeal from a judgment for damages. The court will deal with any motions or questions about that subject when proposed bonds are presented for approval.

APPENDIX D

Panel Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

RICHARD ARNOLD, IV,
Appellee,

v.

EASTERN AIR LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 80-1245

FRANCIS C. MIHALEK,
Appellee,

v.

EASTERN AIR LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 80-1246

HELEN RAE WESTON, as Executrix
of the Estate of Lewis M. Weston, deceased,
Appellee,

v.

EASTERN AIR LINES, INC.,
Appellant.

No. 80-1247

Argued June 2, 1981. Decided June 4, 1982

Before BRYAN, Senior Circuit Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

PHILLIPS, Circuit Judge:

These consolidated appeals grow out of the crash of Eastern Airlines Flight No. 212 near Charlotte, North Carolina on September 11, 1974, which resulted in the deaths of 69 passengers and 2 crew members and serious personal injuries to 9 passengers and 2 crew members who survived. Four resulting lawsuits consolidated for trial generate these appeals. In Nos. 80-1245, 80-1246, and 80-1247, respectively, Eastern Airlines (Eastern) appeals the award of compensatory damages aggregating over $4 million to surviving passengers Arnold and Mihalek and the award of wrongful death damages of $797,000 to the personal representative of deceased passenger Weston, and in Nos. 80-1245 and 80-1246, Eastern appeals the denial of its third party claims for contribution against the United States of America in respect of the Arnold and Mihalek personal injury actions. In No. 80-1334 The Aetna Casualty and Surety Company and other insurers of Eastern (Aetna) appeal the dismissal, following trial to the court and jury respectively, of their action against the United States and four individual air traffic controllers for contribution in respect of their out of court settlements of claims by or on behalf of other crash victims and of a property damage claim for destruction of the aircraft. We affirm the judgment in all respects save the award of wrongful death damages in the Weston action; as to that we find reversible error and remand for a new trial.

I

Following the crash of Flight 212 the great bulk of the ensuing claims by and on behalf of surviving and deceased crash victims were settled out of court by Eastern's insurers. A total of around $22 million was paid in these settlements, and another $3,281,000 was paid in settlement of the aircraft owner's property damage claim.

Not all the claims were settled however. In March and September, 1976, respectively, surviving passengers-plaintiffs Arnold and

Mihalek commenced diversity actions against Eastern in the United States District Court for the Western District of North Carolina seeking, on allegations of negligence, compensatory and punitive damages for their personal injuries. In September 1976, plaintiff Helen Weston as Executrix of the Estate of deceased passenger Lewis M. Weston, commenced a diversity action in the United States District Court for the District of South Carolina seeking, on allegations of negligence, compensatory and punitive damages for the wrongful death of her decedent. In the Arnold and Mihalek actions (but not the Weston action) Eastern impleaded the United States on allegations of the concurring negligence of certain government employees on duty as air traffic controllers at the time of the crash, and sought on this basis contribution from the government in respect of Eastern's potential liability. In its responsive pleadings to the personal injury and wrongful death claims Eastern admitted liability for compensatory damages[1] but denied liability for punitive damages.

In February 1977 Aetna and the other insurers of Eastern commenced an action in the United States District Court for the Western District of North Carolina against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 *et seq.*, and against four federal air traffic controllers under North Carolina common law, alleging concurring negligence by these defendants and seeking on that basis contribution[2] in respect of amounts paid by the insurers in making the out of court settlements noted above.

After all four of these actions[3] had been transferred to the Charlotte Division of the Western District of North Carolina under the guidelines for complex and multi-district litigation, the district court, in early November 1977, *sua sponte* ordered them consolidated for

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[1] The fault specifically admitted by Eastern as the basis for its liability was the "failure of the pilots to be aware of the plane's altitude immediately prior to the crash." On trial the exact nature of this fault was amplified by specific evidence - mainly that preserved by on-board and airport recorders - of pilot inattention and carelessness which the trial judge characterized, with full support from the record, variously as "a shocking lack of attentiveness," "unattentiveness and carelessness of a truly extraordinary nature," "not simply inadvertent but grossly negligent."

[2] The claim as originally pleaded included full indemnification as an alternative on the basis of primary negligence of the air traffic controllers. This alternative was abandoned before trial.

[3] Along with two other actions by airline stewardesses against the United States that were settled before trial.

discovery and trial, subject to reconsideration as to the trial aspect following the completion of discovery. Discovery then proceeded in the consolidated actions until mid-October, 1979. Shortly after completion of discovery Eastern and Aetna moved to sever the Aetna action for trial in order to avoid prejudice to Eastern. After considering alternative proposals respecting the appropriate procedure, the district court denied the motion for severance, and the consolidated actions proceeded to trial.

Following a three-week trial to court and jury,[4] the jury, after seventeen hours of deliberation, returned verdicts awarding substantial compensatory damages, but denying any punitive damages, on the Arnold, Mihalek and Weston claims and finding the air traffic controllers not liable on Aetna's claim for contribution. Arnold was awarded $3,027,500; Mihalek, $1,137,500; and Weston's representative, $847,000. Following briefing and argument of various post-trial motions by the parties, the district court declined to disturb the jury verdicts in any save one particular. On the Weston wrongful death verdict the court determined that it had erred in submitting pain and suffering to the jury as a compensable item of damages and, to correct this error, ordered a remittitur of $50,000, reducing the award to $797,000, which the plaintiff accepted. As so reduced, the court let this verdict stand. On Eastern's third party claim and Aetna's separate claim against the United States for contribution that were tried to the court non-jury, the court made findings of fact and conclusions of law against the claimants, finding the United States not liable for contribution on either claim.

From the final judgment in favor of the personal injury and wrongful death claimants on their claims and against Eastern and Aetna on their respective cross-claim and claim for contribution, Eastern and Aetna have appealed. They assign a number of errors, some commanding more discussion than others, to which we now turn. Further background facts and details of the proceedings will be developed as needed in discussing particular assignments of error.

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[4] The trial format established by the court before trial provided for trial of all the claims to the jury whose verdicts however were only to be advisory with respect to Eastern's third-party and Aetna's direct contribution claims against the United States. As to those non-jury claims, judgment would be entered upon the court's findings and conclusions. Though trial proceeded on this assumed basis down to submission, the court declined at that point to submit the claims against the United States to the jury for an advisory verdict. *See* Part III, *infra*.

II

Eastern's three principal assignments of error - two of which are paralleled in Aetna's assignments - all relate ultimately to the amount of compensatory damages awarded in the personal injury and wrongful death actions. Though subject to independent analysis, the errors asserted are in the end so interrelated that we will discuss them as a discrete cluster.[5]

Both Eastern and Aetna complain first, in chronological terms, of the refusal of the court to sever the originally consolidated actions into two separate trial units: one consisting of the main claims against Eastern together with Eastern's two related third party claims for contribution against the United States; the other, of Aetna's action for contribution against the United States and the four individual air traffic controllers. Eastern claims that consolidated trials (the denial of severance) resulted in prejudicially inflated damage awards against it; Aetna, that it resulted in the introduction into its case of prejudicial irrelevances related to Eastern's culpability; and that indeed there were not between the two units sufficient common issues to permit consolidation under Rule 42(a).

Eastern and Aetna then join in complaining of grossly improper conduct by opposing counsel[6] in making comments and arguments directly to, and in the presence of, the jury. These, they claim, were not adequately corrected by the trial judge and, in consequence, resulted in demonstrable prejudice: to Eastern in the form of prejudicially inflated damage awards; to Aetna, by unfairly prejudicing the jury in respect of the *bona fides* of the insurers' claims for contribution.

Eastern additionally assigns as error the trial judge's refusal to set aside the damage awards as being excessive and the result, however excited, of passion and prejudice.

We take these in order and in combination.

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[5] Though these assignments run to the Weston wrongful death judgment as well as to the two personal injury judgments, we discuss them here only in relation to the latter in view of our remand of the wrongful death action on other grounds. *See* Part IV, *infra*.

[6] Coupled with contentions of counsel misconduct is one of misconduct by plaintiffs' witness Crossfield, a former Eastern vice-president. We have considered that contention and finding it without merit do not further discuss it here.

A

The proper starting point for assessing this cluster of assigned errors is the district court's decision to try these four actions and the third party claims incident to two of them as a single unit. This set the stage for all now challenged that followed.

Assessed for its independent effect upon the judgments appealed from, we find no reversible error in the decision to deny the motions to sever. The decision whether to sever or to consolidate whole actions or sub-units for trial is necessarily committed to trial court discretion. We review only to determine whether the discretion was abused, *Bowie v. Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977), and if so, whether prejudice resulted. Here we find no abuse.

When the motions to sever were made some twelve days before trial, Eastern and Aetna contended that a consolidated trial would necessarily prejudice both of them: Eastern, by the necessary revelation to the jury of the fact and apparent scope of its insurance coverage; Aetna, by allowing evidence of Eastern's allegedly gross culpability to influence the jury in deciding whether any other party should, in view of such gross culpability, share Eastern's (hence Aetna's) burden of liability. To avoid the predicted prejudice they suggested two alternative procedures. First, as a *quid pro quo* for severance of the *Aetna* action, Eastern would abandon its third party claims for contribution against the United States in the two passenger actions thereby foregoing in these actions at least any right of its insurers to contribution in respect of these two litigated claims. Alternatively, in a consolidated trial of all the actions, specific steps could be taken to screen from the jury any knowledge that Eastern had liability insurance coverage or that any settlements of other claims by its insurers had occurred. Counsel for Aetna and Eastern would be introduced as co-counsel for Eastern, no mention of liability insurance would be allowed, and the jury would be informed only of the interests involved in the passenger claims against Eastern and in Eastern's related third party claims for contribution.
appellants were obvious ones which in the exercise of a sound judicial discretion the district court was obliged to weigh. *See Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976). Failure carefully to consider them and the alternative procedures advanced by appellants as a means of avoiding them may well have constituted an abuse of discretion. But the record shows that they were carefully

weighed, both in absolute terms and in relation to countervailing considerations also necessary to sound decision. The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. *See* Fed. R. Civ. P. 42; *see generally* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2383 (1971).

In this case it could not seriously be contended that the purely logistical factors - time, expense, travel burdens, etc. - did not militate in favor of a consolidated trial. Eastern and Aetna have made no such claim. They focus instead primarily on the specific risks of prejudice posed to Eastern by the disclosure of its insurance coverage and to Aetna by evidence of Eastern's possibly gross culpability, and on the absence of any risk of inconsistent adjudications because of the asserted absence of any substantial common issues between the Aetna contribution action on the one hand and the passenger actions with their related third party contribution claims on the other.

Without here exploring the parties' opposing contentions on this point in the same detail that they have been advanced in both courts, it suffices to say that the district court did carefully assess them in detail in the process of making its determination not to sever the actions. We are satisfied that the discretion exercised was in consequence a sound one.

Gauging the possible prejudice to Eastern flowing from the disclosure of insurance coverage, the district court made a pragmatic assessment, one frequently made by federal courts, *see, e.g., Tallant Transfer Co. v. Bingham.* 216 F.2d 245, 247 (4th Cir. 1954), that under the specific circumstances of this case, it would simply be unrealistic to assume either that the jury did not know that insurance coverage existed or that, if it were known to exist, it would likely inflate any damage award made against a corporate defendent such as Eastern. Since liability for compensatory damages was not in issue this was essentially the limit of risk. *Cf. Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir. 1976) (risk of imposing liability because of insurance coverage).

Assessing the possible prejudice to Aetna in its effort to obtain

contribution from the government that would be created by revelation of Eastern's gross culpability and the details of the injuries suffered by the crash victims, the court recognized the risk and explicitly relied upon its ability to safeguard Aetna's interest by appropriate cautionary instructions. We agree that this is the sort of risk that a trial court may properly consider to be controllable by this means, and we are satisfied that the judgment that here it might be controlled was, in the event, borne out.[7]

Addressing the contention that there were no sufficient common issues between Aetna's contribution action and the main and third party contribution claims to warrant consolidation under Rule 42, the court correctly rejected it. Properly identified as substantial common issues were those of proximate causation necessarily involved in the passenger claims that Eastern's negligence proximately caused the crash, and Eastern's and Aetna's claims that the air traffic controllers' negligence concurred in causing it.[8] *See, e.g., A/S Ludwig Mowinckles Rederi v. Tidewater Construction Corp.*, 559 F.2d 928 (4th Cir. 1977).

We are satisfied that at the time the district court made its ruling against severance, it did so reasonably and on the basis of a sound assessment of the proper factors, hence well within the bounds of the discretion committed to it.

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[7] The court gave careful cautionary instructions to the jury in advance of the presentation of evidence designed to clarify the relationships between the different parties and the different claims and to emphasize the necessity that matters relevant to one claim but not to another be kept in mind. The instruction was exemplary in its clarity and accuracy.

[8] In the event, the commonality of these issues was made plain by trial developments. Indicative is the trial judge's assessment of the evidence as it bore upon the contribution claims directly against the United States which he decided non-jury. The same evidence of course bore upon the asserted individual liability of the air traffic controllers as alleged joint tortfeasors with Eastern, an issue submitted to and decided by the jury.

After recognizing that pilots and air traffic controllers both have a duty to exercise due care to avoid accidents . . . " and that "[t]he fact that the pilots . . . were guilty of negligence, proximately causing an accident, [does not] preclude a finding that negligence on the part of the controllers was also a proximate cause," the judge concluded that on the evidence adduced air traffic controller negligence had not been established as a concurring proximate cause. "An accident of this sort could only occur through pilot inattentiveness and carelessness of a truly extraordinary nature. Failure of [the] controllers to observe the altitude of the plane . . . , if a cause at all, was a remote rather than a proximate or provoking cause."

B

Eastern's major contention on appeal - another of those in which Aetna joins - relates to conduct of opposing counsel in making improper comments and arguments to the jury. So gross was this conduct, and so manifestly did it taint the jury verdicts, say the appellants, that only by setting the verdicts aside could the prejudice be cured. The district court failed, they say, properly to curb and contain its effects as it occurred and committed reversible error in declining on their post-trial motions to correct it by that ultimate means. Though the contention is a serious one that has been treated accordingly, we conclude that here too the district court properly acted within its discretion in declining on this ground to reject these verdicts.

Of the many details of trial management necessarily committed to broad trial court discretion, perhaps none is more due appellate deference than conduct of non-judicial participants in the process that is asserted unfairly to have prejudiced the jury. *See Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *see generally* F. James and G. Hazard, *Civil Procedure* § 7.18 (2d ed., 1977).This is a matter preeminently for on-the-scene sensing by trial judges. At that vantage point demeanor - here that of the jury - can be observed; the impact of efforts to control and dissipate prejudicial effects can be assessed in light of the interpersonal relationship that inevitably develops between trial judge and jury; and the actual effect of the conduct upon jurors - an effect frequently at odds with or actually counter-productive to that improperly intended by the offender - can be gauged first-hand. For the very reason that the problem is essentially one of assessing the immediate emotional and psychological effect of specific ac-

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"Moreover, the court is not persuaded, as apparently neither was the jury, that a warning from the tower, if it had been received, would have prevented the accident. The crew were not simply inadvertent but rather were grossly negligent. They distracted themselves with extraneous matters; they did not look out the window to see what numerous others saw - that they were dangerously low; they failed to comply fully with procedures instituted to keep flight crews awake and conscious of their altitude while descending and landing; they ignored the visual readings of five pairs of altimeters and beacons showing that they were too low and descending too fast, and they also ignored a shrill whistle and red light which called their low altitude emphatically to their attention. I am unable to find that an additional request from an air traffic controller that the pilot check his altitude would have changed the outcome."

tions and words on particular people, the appellate vantage point in retrospective review on a cold written record is especially subject to misperceptions of what actually transpired and, more subtly, to miscalculations of likely effects. It is for this reason that trial court discretion as to these matters is broad or - what comes to the same thing - appellate review is especially deferential.

It is important also to emphasize that review here is ultimately focused not upon the impropriety of counsel's conduct but upon the propriety of the trial court's response to it.[9] Of course if the conduct challenged is not by applicable standards improper in the first place, then there can be no abuse of judicial discretion in failing to take any, or particular, action to correct it. But the mere fact that conduct is improper - even grossly improper - does not end the inquiry. The question remains whether the judicial response - or lack of response - to the legally improper conduct constituted a prejudicial abuse of discretion. In consequence, a conclusion that no prejudicial abuse of discretion has been shown is not necessarily a condonation of the challenged conduct, though this is likely always to be - as it is here - the dire assertion of appellants.

Orderly review will therefore look first to the question whether and in what respects challenged conduct was in legal contemplation improper, then turn, if need be, to the more difficult question of the adequacy of the judicial response. We proceed on that basis.

There is no doubt that tested as and when it occurred by applicable legal standards much of the conduct specifically challenged was improper. Indeed the legal impropriety of some of it has been conceded both below and here by offending counsel. Beyond its legal impropriety, it was in substantial part inelegant, tasteless, offensive, arguably violative of professional standards and, perhaps most deserving of condemnation, irresponsibly threatening to any verdicts that might in the end be obtained by offending counsel's clients.

Since in the end we find no abuse of discretion in the trial judge's overall response to it, we might simply let stand this general assessment and disapproval of counsel's conduct. Fair review - to both sides - requires, however, that the general assessment be made more

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[9] The specific response under review is of course the ultimate one: the directly challenged refusal to set aside the verdict. Earlier, pre-verdict responses (or nonresponses) are reviewed incidentally, as elements in the totality of the circumstances bearing upon the exercise of discretion in letting the verdict stand. *See* F. James & G. Hazard, *supra*.

specific. Only so can offending counsel be protected against implication or speculation that things may have been even worse than they were in fact, and appellants be provided an adequately reasoned statement for our basis of decision. Additionally, the adequacy of judicial response can only be fairly gauged in reference to specific conduct.

Without attempting full embellishment of some of its more colorful elements, we first identify the specifically challenged conduct. In identifying it in mass and without full contextual detail it is important to keep in mind that of course it did not all occur in such possibly jolting proximity but in pieces over a period of days, and that its real flavor could only be appreciated in full trial context. Here we merely identify it to point up the various respects in which, under applicable standards, it was or was not legally improper to the point that judicial response of some kind was appropriate. For sake of analysis, we group the principally challenged comments and arguments in general categories.

In his opening statement to the jury one of the plaintiffs' counsel urged the jury to use the Golden Rule approach in fixing damages. After advising the jury that they would hear evidence of psychic injuries sustained by the plaintiffs and admonishing that "we do not present this evidence to you by way of asking for your sympathy," he added, "[w]hat we do ask you to do is to listen to it carefully, place yourself, if you can, in their shoes."

During jury selection government counsel, representing the contribution-claim defendants, called attention to the fact that the defendant air traffic controllers had children, one of whom had recently died. In opening statement the same counsel suggested that the only reason for the contribution claims was to mislead the jury as to the real issues.

In closing arguments to the jury different ones of plaintiffs' counsel and government counsel from time to time:

—made an outright appeal for sympathy: "I'm asking, I'm begging for your sympathy for this man . . . They [plaintiffs] are begging for your sympathy";

—made disparaging remarks about defense witnesses: of one witness, that Eastern "must have searched the countryside" for him; and, of his testimony, that "for 40 bucks an hour, you can probably get almost anybody to say anything"; of another witness, Frank Borman, President of Eastern, that he was "pompous," "god-

like'' and that he, with others in Eastern's management, were now ''condoning the very thing that killed 72 people'';

—made disparaging personal references to defense counsel: ''the gang over here''; ''the best Eastern's money can buy''; that one was ''ashamed'' of his case and that plaintiffs' counsel was ''sorry for [him] and that kind of attitude'';

—made improper and intentionally inflammatory comments about Eastern's wealth, position and general culpability: ''murderers' row''; the ''great white knight corporation''; a ''little poor airline'' which ''offered to buy [another line] for 342 million dollars''; that it had been engaged in ''whacking them into the trees in Houston . . . running off the runway in Buffalo . . . ''; had ''killed 112 human beings in New York''; that ''killing people and maiming people is something they've gotten immune to as a part of doing business'';

—offered personal opinion as to the injustice and lack of merit of Eastern's defenses and Eastern's and Aetna's contribution claims: ''outrageous''; ''insulting''; attempt to ''pass the buck''; ''Eastern's bad joke''; ''makes me sick''; makes me ''angry''; ''haven't really taken on that human responsibility to say we're sorry''; ''lack of accountability''; and offered contrasting personal opinions as to the justice and merit of plaintiffs' tactical decisions not to sue the United States and the air traffice controllers: ''the reason . . . is a simple one, [t]hey aren't liable, and we have a duty . . . not to sue people or the government when there isn't any liability'';

—made improper references to settlements and settlement offers: ''no offer to settle Mrs. Weston's case as long as I have been the attorney for the case''; defense counsel represents ''the 19 insurance companies that have been busy buying off the claims of the other people, and he's finally run up against three human beings . . . and three lawyers that ain't going to be bought.''

For purposes of this appeal we can accept that most of these statements and arguments (and there were others of comparable quality) were legally improper - in the sense that at the least and as to most some kind of censure or curative instructions by the trial judge - either *sua sponte* or on motion - would have been appropriate. Some obviously fell more clearly beyond the bounds of permissible advocacy than others. Some arguably lay at least marginally within legal bounds if not within those of the common civility that

countless good lawyers have demonstrated is compatible with effective advocacy.

The Golden Rule appeal in opening statement and the blatant, direct appeal for sympathy in closing argument were plainly improper, and offending counsel concede this. The tasteless and irrelevant comments and allusions to and about opposing counsel were improper under applicable professional standards and justified censure if for no other reason than to preserve some degree of respect among the attending public for the profession and the process. Less clearly improper in the legal sense - though arguably so close to the line that some cautionary instruction would not have intruded unfairly into the prerogatives of advocacy - were the personal characterizations of witnesses, the equally heavy-handed expressions about the *bona fides* of the defendants' tactical decisions in defending the actions, and some of the more pejorative comments about the degree of Eastern's culpability in relation to other air crashes. Of the same general stripe were the references to the defendants' refusal to make settlement offers to the plaintiffs, though in fuller context, as will appear, the technical impropriety of those comments may not have been that certain.

This leads then to the critical inquiry whether, on total balance, the trial judge's response to these several incidents of clear or arguable misconduct, leading finally to his refusal to set aside the verdicts, constituted a prejudicial abuse of discretion. As to this no more precise legal principles than those implicit in the general concepts of "abuse" and "prejudice" exist. In consequence, there is not much of specific precedential value to be found in other cases - as the parties readily demonstrate on this appeal by their equal ability to cite apparently conflicting decisions on the significance in different contexts of various examples of counsel comments closely comparable to those here in issue. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil*, § 2809 & nn.2-6 (1973). In the final analysis the question is simply one of judgment to be exercised in review with great deference for the superior vantage point of the trial judge and with a close eye to the particular context of the trial under review rather than to any general formulations of principle or to assessments of comparable comments in other cases.

Helpful in focusing this general inquiry upon the specific ruling challenged - the refusal to set aside the verdict because of counsel's misconduct - is the Sixth Circuit's recent prescription for practical

and principled review of such rulings in *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980). Fair review, said that court, must take into account the "totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself. " *Id.* at 756.

This is a helpful guide to proper and consistent review. It focuses in a practical and systematic way upon whether, all things considered, the virulence of the comments, their intrinsic capacity unfairly to prejudice the jury on the real issues, the inadequacy of any judicial efforts made to contain them or of any extrinsic factors of time or context to dissipate their force, make it a "reasonable probability" *id.*, that they improperly influenced the jury in reaching its verdict. "Improper influence" here must be understood to mean effective subversion of the jury's reason or of its commitment to decide the issues on the evidence received and the law as given it by the trial court. Only if such a reasonable probability is found can an abuse of discretion in declining to set aside that verdict be found. Our review on that basis discloses no such abuse.

Perhaps the single most important of the relevant circumstances here is the nature of the "real" issues before the jury. It is only with respect to these that the probability of improper influence can properly be gauged. They determine not only the content range of proper comment and argument but, to a considerable extent, the degree to which improper influence as opposed to the normal influence of partisan advocacy can be reckoned as probabilities in explaining the verdicts.

The dominant issue in this trial was the degree of Eastern's conceded culpability. This bore directly upon that defendant's liability for punitive damages. It bore less directly, but nevertheless legitimately, upon the claim of Aetna to recover contribution from the air traffic controllers as alleged joint tortfeasors, since it was inextricably bound up in the primary issue of proximate causation central to that claim. It also of course bore directly upon the amount of punitive damages that might be recovered against Eastern. The other issues in the case were the amounts of compensatory damages due the three plaintiffs, liability for some amounts having been conceded.

The permissible range and content of inevitably damaging evidence

and argument opened by these issues was wide and of an inescapably volatile nature. On the culpability issue, the substantive law not only permitted but required evidence - hence partisan argument - going to establish negligent conduct that a jury could find gross, wanton, and consciously indifferent to others' rights. *See, e.g., Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E.2d 148 (1978). On the compensatory damages issue, the nature of the injuries suffered by the miraculously surviving, completely faultless personal injury plaintiffs - hence of the evidence to establish its severity and lasting effect - was necessarily calculated to excite in any jury some degree of human sympathy, with or without overt appeals for it by counsel. *See Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1275 (D.V.I. 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1975).

When such issues legitimately dominate the trial of a case, a trial judge may well have a heightened obligation to police counsel against excesses of zeal and deliberate impropriety. By the same token, the obligation must be recognized as an exceedingly difficult one to discharge in fairness to both sides. In such cases the substantive law itself invites, indeed compels, inquiry into emotion-laden areas, hence evidence and argument that necessarily track the substantive law's content. In consequence, a trial judge attempting to contain excessive emotional appeals by counsel must be concerned as well to avoid unfair intrusions into the prerogatives of advocacy in developing the issues legitimately in dispute. Punitive damage issues - whether gross culpability exists, the amount required to deter and punish - are of course prime examples.[10]

Not only does the dominance of such issues justify cautious policing of emotional sallies during trial. More importantly for our purposes, it counsels great caution by reviewing courts in finding improper influence as the probable reason for a verdict disfavoring a party against whom the influence of peculiarly damaging but wholly proper evidence already inevitably runs so strongly.

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[10] In this they share to some extent with libel cases the characteristic that caused Judge Spears to opine in *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 714 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967), that "the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama," and Judge Wyzanski, writing more generally, to say of a political libel suit that "it is the modern substitute for ordeal by battle" in which "the prudent and second-thinking judge will stand severely aside, acting merely as a referee applying the Marquis of Queensbury rules." Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1283-84 (1953).

When the specifically challenged arguments here are related to the real issues and to the verdicts returned upon them, perspective is properly gained. Without condoning them, we can lay aside as offensive irrelevancies - sufficiently dissipated in any event by general cautionary instructions of the trial judge[11] - the snide allusions to and characterization of opposing counsel, of that counsel's conduct of the litigation, and of opposing witnesses. The theoretical possibility that either alone or in cumulative effect these may have exerted some generally improper influence on the jury's deliberations cannot be gainsaid. To find this a reasonable probability, however, would denigrate a jury whose obvious care in deliberating on this case over a period of some seventeen hours strongly belies even the possibility that its reason and its will to obey its mandate could have been subverted by such uninspired flights of invective.

The pejorative characterizations of Eastern's culpability, wealth, and callousness related essentially to the punitive damage issue. While gross and unimaginative in tone and phrasing, the substance of these arguments and comments lay at least arguably within the range of fair comment on evidence properly introduced on this issue. More importantly, their intended influence - whether proper or im-

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[11] *E.g.*, in closing instructions: "Your verdict is not to be based upon prejudice or sympathy or any bias you may have for or against flyers or people who get hurt. It's not to be based on emotion or on any outside information you may have about the case . . . . You are not to decide any fact on speculation or guesswork or conjecture. You're not to decide on any basis of a guess as to what you think the Court would do if the Court were the jury . . . . You are the jury, and you're to pay no more attention to what you think the Court would like for you to do than you are to what lawyer I last cussed out or who I fussed at the longest. The controversy is not between the lawyers and not between lawyer and lawyer, although they are the ones who generate the evidence and the biggest commotion. The question is one of law and justice among the litigants."

During trial: "[W]hen lawyers have been sitting for hours under tension they sometimes explode, so do judges, and I again instruct you that you are not to decide the case based on anything that takes place among the lawyers or between the Court and lawyers . . . A little bit of temper flaring is natural, sometimes a little distraction takes place, but it usually livens up the proceedings, so long as there is not too much of it."

Whether these cautionary references to the lawyers' behavior and the court's response to it actually had the intended effect is of course beyond any reviewing court's power to gauge. What can be said is that in content it was directly on the mark, and that in the very homeliness of its style it was calculated to put the matter in proper perspective as peripheral flares of temper, "commotion," and "fussing" irrelevant to the jury's fact-finding obligation.

proper - was not realized on this issue since the jury found in Eastern's favor on it. That the arguments may indirectly and improperly have influenced the compensatory damage verdicts in a possibility recognized by the district judge that is better assessed in connection with our consideration of the size of the damage verdicts as itself suggestive of improper influence.

This leaves the Golden Rule suggestion in opening statement and the direct appeal for sympathy and the settlement comments in closing argument. We look first to the comment that no settlement had been offered.

Aside from the possibility that this comment by counsel for plaintiffs may have been invited,[12] we think the trial judge adequately corrected and dissipated any improper influence stemming from it. Immediately after the comment was made, the judge, on objection of opposing counsel, severely admonished offending counsel in the presence of the jury and gave a firm and clear cautionary instruction.[13]

The Golden Rule and sympathy appeals are the most obviously improper arguments from a technical standpoint. Having no legal relevance to any of the real issues, they were *per se* objectionable in this case as they are in any. *See, e.g., Leathers v. General Motors Corp.* 546 F.2d 1083, 1086 (4th Cir. 1976). Because here they had the potential, and were undoubtedly intended, improperly to influence the jury on the compensatory damage issue, their possible impact on that issue deserved careful attention. The following cir-

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[12] In his opening statements to the jury, counsel for Aetna, over plaintiffs' objection, told the jury that the insurers had "settled some 70-odd cases and paid out $21,788,957.72." The trial judge speculated in determining how to handle the later challenged comment by plaintiffs' counsel that the first reference may have been an improper attempt to establish in the jury's mind a comparable range of recovery, and that the later comment was an ill-advised, tactically unsound effort to counter that. *See Hall v. Texas & New Orleans Ry.*, 307 F.2d 875, 879 (5th Cir. 1962) (retaliatory argument judged differently).

[13] To counsel: "You may stay off of subjects which are forbidden for counsel to argue to juries whether they are true or false . . . . You better obey. The next time there won't be just a reprimand."

To the jury: "[s]ettlement of a suit or a claim is not admission of anything unless it contains . . . a formal admission of facts or formal admission of liability. The fact that a party does or does not offer to settle a case is not something for you to consider, has no bearing on the legal and factual questions which you may have to decide."

cumstances suggest that, as the district court concluded, actual prejudice from them was in the event unlikely. In the first place, no contemporaneous objection to either was made by trial counsel.[14] While silence may sometimes reflect a prudent tactical assessment that objection will only magnify prejudice so that failure to object should not be held against the non-objector, *see Werner v. Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980); *Leathers v. General Motors Corp.*, 546 F.2d at 1086, it may also reflect a deliberate sandbagging tactic, *see Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967), or a tactically sound assessment by the person best able to judge the matter that though technically objectionable, the comment threatens no significant prejudice. Without speculating about possible sandbagging tactics, of which there is no intimation in the record, we are satisfied that the last possibility is the most realistic one here.[15]

The Golden Rule appeal was made in an opening statement several weeks before the case was submitted to the jury. It was, in fact, a rather cryptic interstitial comment which in context may well not even have conveyed to the jury the impermissible suggestion implied by the term. The issue of compensatory damages on which it bore was not a thin one that might actually have been tipped by the suggestion: liability was conceded, substantial damages in some amount were inevitable given the severity of the injuries concededly suffered. *Cf. Leathers v. General Motors Corp.*, 546 F.2d at 1086 (reversible error where liability issue "thin").

The outright appeal for sympathy occurred some three weeks later in closing argument by another counsel for plaintiffs. It was the only such appeal made in an argument lasting some forty minutes

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[14] Under the circumstances we are not disposed to seize upon this as a basis for declining review of the specific objections now raised. *See New York Central R.R. v. Johnson*, 279 U.S. 310, 318-19 (1928). Whether the failure to object may then, however, be taken into account in considering the objection on the merits is a different matter.

[15] Eastern's trial counsel - not the same as appellate counsel - were not generally asleep at the switch nor following a general policy of not objecting in order to avoid magnification of prejudice. On at least three occasions they did object to other arguments and comments by plaintiffs' counsel. None of these, however, is specifically brought forward by Eastern's appellate counsel as examples of improper conduct. To the extent this represents disagreement between trial and appellate counsel as to the potential for prejudice in particular conduct, the former's assessment may well be assumed to be the better informed.

that was not otherwise objectionable. No comparable direct appeal for sympathy was made in either of the two other closing arguments by plaintiffs' counsel. This was not a drumfire effort. *See Moore v. Teflon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978). It was made in behalf of a terribly injured plaintiff whose condition as properly presented to the jury was so naturally provocative of sympathy that the lawyer's overt appeal is best seen in context as a foolish redundancy rather than an independent source of prejudice.

We turn now to the verdicts themselves as circumstances indicative of improper influence. Eastern's contention on this point is inextricably bound up with its related contention that the damage awards should have been set aside as *per se* excessive. While possibly susceptible to separate conceptual analysis, these contentions are so closely related that we treat them here together.

The personal injury damage awards were indeed substantial: $3,027,500 for Arnold's personal injuries; $1,137,500 for Mihalek's. The district judge carefully considered the contention that they were so substantial as to be excessive and manifestly the products of passion or prejudice, whether traceable specifically to counsel's misconduct or to unidentified causes. It lay within his sound discretion to set the verdicts aside if he conceived them to be excessive without regard to a specific reason, or if he thought them indicative, either alone or in combination with other circumstances, that counsel's misconduct had probably inflated them to the point of excess. It also lay within his sound discretion to determine that all things considered they were not excessive, hence to decline to set them aside. This of course he did. Our review of that determination - without regard to the alleged cause of excessiveness - is only to assess whether on an independent review of the evidence, *see Grunenthal v. Long Island Rail Road*, 393 U.S. 156 (1968); *West v. Richmond, Fredericksburg & Potomac Railroad*, 528 F.2d 290, 292-93 (4th Cir. 1975), the awards were so "untoward, inordinate, unreasonable or outrageous," *Grunenthal*, 383 U.S. at 160, that we must set them aside in exercise of our review power. As Judge Sobeloff pointed out in defining our role in reviewing such rulings, we are confined to looking for something more than mere "excessiveness":

> We operate in a narrower area of discretion than district courts in the supervision of jury verdicts. It is not enough if our appraisal of a jury's calculation of damages does

> not run parallel to the trial judge's appraisal. In reviewing the justness of a verdict the broader scope of discretion is in the trial judge, and the Supreme Court has made it plain that the appellate court must stand aside. The Court has acknowledged the possibility of appellate intervention only in the most extreme circumstances, as where the verdict is not merely excessive but "monstrous," a term borrowed from the old English case, Beardmore v. Carrington, 2 Wilson 244 (1764). In very few cases, however, where such a possibility was discussed has this high hurdle been surmounted.

Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012, 1020 (4th Cir. 1965) (footnote omitted). Or, as Judge Medina put it for the Second Circuit:

> If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand.

Dagnello v. Long Island Rail Road, 289 F.2d 797, 806 (2d Cir. 1961) (footnote omitted), *quoted with approval, Grunenthal v. Long Island Rail Road*, 393 U.S. at 159.

In conducting this extremely limited review to determine whether a verdict is not merely excessive but outrageously or monstrously so, we have recognized that a verdict cannot be so characterized if there is in the record credible evidence which if accepted by the jury and given its most favorable inferences will support it. *See West v. Richmond, Fredericksburg & Potomac Railroad*, 528 F.2d at 292. Reviewing on this basis and under this standard we cannot hold these verdicts outrageous or monstrous in relation to the evidence of record.

In each of the personal injury cases, the major component in the damage award was pain and suffering, an item obviously not susceptible to fixing with mathematical precision but instead a matter of collective juror judgment based upon the relevant evidence and the commonly shared human experience. It is as to this component that

the inquiry into excessiveness most directly relates.

Looking first to the Mihalek award of $1,137,500, a total of $7,934 in medical expenses was established without dispute. Though Eastern sought by careful cross-examination to discount the actual extent of Mihalek's pain and suffering and loss of past and future earnings, it offered no evidence directly refuting plaintiff's evidence. That evidence would have justified the jury in accepting the following view of the consequences of the accident as now contended in Mihalek's behalf.

On September 11, 1974, Mihalek, then a forty-five year old businessman, was a passenger in the first-class section of Flight 212. In the crash he was critically burned, lacerated and battered. His hands were so burned that the flesh was hanging by the knuckles. Burns extended over the entire top of his head, and portions of his forehead, cheek, ear and neck. There were burns on his back, his right forearm and his elbow. The arm was broken, with the bone protruding at the elbow. Mihalek was hospitalized for five weeks. After he was released, he was reqired to make continuing periodic visits as an outpatient for physical therapy well into 1975. He has a permanent limitation of approximately 22% in the functions of his various limbs and digits.

The most devastating injuries to Mihalek as a result of the crash of 212, however, are emotional ones. Before the accident, he was a good father and family man, an industrious and aggressive businessman who liked to tackle and solve problems, an outgoing, energetic individual who was considered by business associates to be extremely efficient and honest. Before the accident, he had worked his way up at AVCO-Lycoming from a machinist into the position of Director of Industrial Engineering. When that organization closed the facility at which he was employed, Mihalek began his own company. So successful was this venture that another company subsequently brought Mihalek out and transferred him to Charleston, where he was to supervise 40 people in the start-up of a new facility. Mihalek's energy, business acumen and supervisory ability during these years resulted in his annual income rising from $20,944 in 1970 to $143,988 the year preceding the crash.

After the accident, Mihalek suffered devastating emotional difficulties. He was unable to cope with seemingly minor situations, became very docile and tended to stay at home. He would burst into tears spontaneously at home, in public, and with friends. He felt detached, withdrawn, and unmotivated; suffered from loss of

interest and loss of energy; and had difficulty in completing simple tasks. The most devastating effect on this once-vital man was that he had lost a sense of power and control over his own life. He had problems concentrating and he had a sense of unease, dread and anxiety. His income dropped severely and during the four years preceding the trial, he had no income at all.

According to an expert psychiatric witness who examined Mihalek, he suffered from a chronic post-traumatic stress disorder precipitated by the accident and is permanently psychologically impaired because of the accident. According to an expert economics witness, the present cash value of the actual economic loss to Mihalek because of the crash of 212 is $520,689 exclusive of such job-related benefits as life insurance, health insurance and a retirement pension plan.

Commenting on this evidence, the trial judge cogently observed that from it "the jury was entitled to conclude . . . that . . . Mihalek . . . has suffered a lifetime psychic disability, and that as a result . . . a once confident, ambitious, and highly competent business executive has been reduced to passivity, inactivity and despair . . ; starting from that premise, there is nothing excessive or shocking in the award of $1.1 million that, in addition to the other demonstrated elements of damage, compensates Mr. Mihalek for the lifetime loss of what he was as a person before the accident occurred." We would not be disposed to quarrel with that assessment were our standard the same as the trial judge's. Certainly, gauging it by the narrower standard of "outrageousness," we would not.

Turning to the Arnold award of $3,027,500, the undisputed evidence established medical expenses of $50,646 and lost wages of $13,386 as of trial time. As with the Mihalek evidence, Eastern sought to discount Arnold's evidence of pain and suffering and loss of future earnings only by cross-examination. From Arnold's evidence, the jury could have accepted the following view of the consequences of the crash to him in relation to these items of damage. At the time of the crash, Arnold, a passenger, was a thirty-one year old systems engineer employed by IBM. He was a college graduate who before joining IBM had been honorably discharged as a captain in the United States Air Force where he programmed computers. In the crash he suffered multiple lacerations and general trauma, but his principal injury was by burning. He was severely burned over extensive portions of his body. Taken after emergency treat-

ment in Charlotte to the Medical College of South Carolina in Charleston, he was hospitalized there in the Burn Unit of the hospital for two and a half months where he received extensive treatment of a painful and emotionally destructive nature.

A total of 33 debridements (the cutting away of dead skin in order to get to live skin) were performed. He underwent eight skin graft operations, many of which required that he be put upon a Stryker frame which suspended him upside down for days. After Mr. Arnold left the hospital, he continued outpatient therapy. He had to learn to walk again and suffered severe physical deformities. Additionally, after his initial stay in the hospital, Arnold underwent four operations in an attempt to restructure his hand.

The major permanent injuries sustained were to his hands. According to an orthopedic and hand surgery specialist, Arnold's right hand was 100% permanently disabled and his left hand has a 52% total permanent disability. The remainder of Arnold's body was horribly scarred from the burns and the frequent skin grafting attempts. The jury viewed the skin on Arnold's body, still terribly deformed after five years. According to an expert psychiatric witness, Arnold suffers from a chronic neurotic illness which he would continue to have unless he went into intensive psychotherapy, and in consequence looks upon himself as a defective individual.

In commenting upon Arnold's evidence of pain and suffering, the trial judge remarked that "though dramatic" it was "credible and without parallel in the experience of the trial judge" and stated that "in combination with the lifetime disfigurement and disability proved at trial and other proved damages, [it] renders the $3 million award neither excessive nor shocking."

Reading the cold record, we might be more adversely affected by the apparently contrived dramatization of some of Arnold's testimony than was the trial judge in whom it only prompted a passing characterization. But this simply illustrates the reason why our discretion in review is wisely made narrower than his in assessing the probative force of this kind of evidence. We are not prepared to say that the size of this verdict does more than make the question of excessiveness with us a close one. As indicated, that is not enough to justify substituting our judgment for that of the trial judge. He had the supreme advantage of assessing not only Arnold's demeanor as a witness and his personal appearance but also of gauging the immediate reaction of the jury to his patent overdramatization of events and conditions and his rather obvious efforts at ingratiation.

When all is discounted, there remains the fact that Arnold has sustained at age thirty-one injuries which, in addition to the immediate consequences of profound physical and emotional shock, intense post-crash suffering, and painful and demeaning medical treatment, have left him, after the best endeavors of medical science, a relatively young man permanently disabled in essential body functions, permanently scarred and disfigured in physical appearance, and permanently damaged emotionally and psychologically. Though he remains a functioning human being, he has been substantially shattered as the whole person he was before the crash, and will live out his days suffering the consequences. An award of $3 million to compensate him for these consequences in addition to his direct monetary losses and expenses is undoubtedly a generous one and one which might in the exercise of sound trial court discretion have been deemed excessive, but we cannot say of it that it is so monstrous or outrageous that we should intervene in the jury's fact-finding function to disturb it at the appellate level. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2820 & nn.95, 97 (1973).

In sum, upon considering the totality of the circumstances bearing upon the matter, we cannot say that it is reasonably probable that counsel's misconduct - objectionable as it was in many details - improperly inflated these damage awards. There are too many other and proper bases upon which their concededly generous amounts may be explained.[16] To indulge such an assumption would be to denigrate a jury which to all appearances of record was not

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[16] In this connection it is appropriate to note another improper basis which, if accepted, would have provided an independent discretionary ground for setting aside the verdict. This is the possibility that the verdicts represented an improper jury "compromise" of the punitive liability and compensatory damage issues. The trial judge in fact recognized this as a possibility, but in the end of course did not seize upon it as an alternative independent ground for setting the verdicts aside. On this appeal counsel for appellants belatedly seek by this "compromise" theory to trace the prejudice from counsel's misconduct away from the punitive damage issue - on which they won - into the compensatory damage awards. In this they meet themselves coming back. In the trial court they contended - opposing the possibility of a new trial on both issues and arguing instead for new trial on the compensatory damage issue alone - that the jury had not so entwined the issues in its verdict that it was wholly tainted. While the well established procedural bar to such changes of position is not an absolute one and should yield in appropriate circumstances, we see no reason to depart from it here. There was no adversary presentation of this possibility in the district court.

in a "runaway" mood in which it would be likely prey to such influences. It would also be to assume that the various cautionary instructions of the trial judge, only some of which we have specifically noted,[17] were disregarded by the jury. We think that instead we must presume on this record both that the jury understood and was faithful to its general mandate and that it was responsive to the specific cautionary instructions. Neither are we prepared to say upon an independent review of the evidence, *see Grunenthal v. Long Island Rail Road*, 393 U.S. at 159-60, that the amounts of these awards are so outrageous, or untoward, or monstrous that, irrespective of cause, they must be set aside in exercise of our narrowly constrained appellate review powers. *See Neese v. Southern Railway*, 350 U.S. 77 (1955).

For many of the same reasons, we much more readily conclude that counsel's misconduct cannot be declared a "reasonably probable" explanation of the jury's verdict against Aetna on its contribution claim. Laying aside all the other factors, the critical circumstance here is that, to us, the issue of concurring negligence - of proximate causation - on which this claim turned, simply cannot be assessed as one so "close" that we would be justified in attributing the verdict upon it to any such improper influence. While the issue going in was obviously an honestly disputable one, the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was, in the district court's stated analysis, a "remote rather than a proximate cause." [18] We are not prepared to reject that ready and proper explanation in favor of the improper one for which Aetna contends. Obviously we find no abuse of discretion in the district court's refusal to set aside this verdict on this ground.

III

Eastern and Aetna have either jointly or independently assigned other errors which we have considered, found not to require reversal, and merely identify here without extended discussion.

Eastern complains of the admission of evidence concerning crashes that occurred after the one here in issue. We agree with appellees

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[17] *See* notes 7, 11, 13 *supra*.

[18] Made in deciding the contribution claim against the United States non-jury. *See* note 8 *supra*.

that in the peculiar context of this trial and particularly in view of Eastern's attempt in earlier testimony to establish an improving safety record at the critical time, the district court did not abuse its discretion in admitting this evidence as relevant, both for direct and rebutting purposes, to essential elements of the punitive damages claim. On Eastern's and Aetna's challenge to the district court's findings and conclusions exonerating the United States from liability for contribution, we find no clear errors of factual finding nor errors of law justifying reversal. Indeed we find the findings and conclusions unassailable on the evidence adduced. Aetna has complained of the court's instructions to the jury on the contribution issue; but after a review of those instructions in total compass we find no prejudicial error. We think that the instructions properly explained the relevant principles of concurring negligence and proximate causation that controlled resolution of the contribution issue. Finally, we see no error in the district court's refusal to admit Aetna's proffer of certain evidence related to improper training and supervision of the air traffic controllers. Other evidence on the issue was admitted, and the district court's exercise of its discretion in refusing the additional proffers was not improper.

IV

On Eastern's challenge to the district court's action in allowing the Weston wrongful death plaintiff to accept a remittitur of $50,000 and entering judgment on the reduced verdict we find error which, regrettably, requires reversal and remand.

Before the jury retired, counsel for Eastern duly objected to the submission to the jury of pain and suffering as a compensable item of damages on the wrongful death claim. The basis of this objection was that there was insufficient evidence that Weston had survived the crash even momentarily to permit an inference that he consciously experienced any pain. The district judge permitted the jury to consider the question, but in his written ruling upon Eastern's post-verdict motions to set aside the verdict, he stated that upon reflection he was persuaded that he had committed "technical error" in submitting this as a recoverable item of damages. On that basis he ordered a new trial on damages alone conditioned upon plaintiff's refusal to accept a remittitur of $50,000. When plaintiff accepted the remittitur in this amount, the court entered judgment in the reduced amount of $797,000. We express no opinion as to whether this issue properly should have been presented to the jury,

but we nevertheless hold that the use of the remittitur device here was improper.

Having accepted the remittitur, the plaintiff did not, as she could not, *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), appeal from the resulting judgment. In consequence, on Eastern's appeal the only issue presented for review is the propriety of the district court's action in allowing the remittitur as a means of correcting its perceived error. The precedent ruling, that trial court error made the verdict unsupportable in the amount awarded, is not properly before us for review. Only the plaintiff, as the party aggrieved by it, could challenge it on appeal. Though as appellee she has sought to do so, contending that pain and suffering was properly submitted, she is limited as appellee to defending, on any grounds available on the record, the judgment as entered and may not seek to enlarge her rights under it, as would a successful attack upon the ruling. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).[19] Our review is therefore limited to the issue raised by Eastern's appeal on this point: whether the corrective action thereafter taken by the trial court was proper. We hold that it was not.

Remittitur may properly be used to remedy an excessive award of damages made by a properly instructed jury if the award is not attributable to passion or prejudice. *See generally* 6A *Moore's Federal Practice* ¶ 59.05(3). But we agree with those courts that have held that it may not properly be used over a defendant's objection to remedy a trial judge's error unless the amount of the award traceable to that error can be at least closely approximated or capped by a maximum figure through resort to the trial record. *See*

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[19] We note that in *Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1085 (7th Cir. 1978), the court held that a plaintiff in a comparable situation was entitled as appellee to challenge such a precedent ruling "[f]or the limited purpose of defending the remitted judgment." While this approach may have first blush attractiveness, in view of the now-settled federal rule that a plaintiff who accepts a remittitur may not appeal from the remitted judgment, *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), we respectfully disagree with it. The rule that prohibits an appellee from attempting to enlarge rights under a judgment is a long-standing and salutary one that serves important ongoing procedural values. We fail to see how allowing an attack on the precedent ruling here has the "limited purpose" of - or is indeed at all necessary to - merely defending the remitted judgment. To allow it is to permit direct circumvention, in any case where the defendant appeals a remitted judgment, of the *Donovan* prohibition against remitting-plaintiff appellate challenges. Perhaps significantly, the *Durant* court, reviewing the precedent ruling at appellee's behest, found no error in it.

Durant v. Surety Homes Corp., 582 F.2d 1081, 1085-86 (7th Cir. 1978); *Jacoby v. Johnson*, 120 F. 487, 488-89 (3d Cir. 1903); *see also New York, C. & St. L. R. Co. v. Niebel*, 214 F. 952, 957-58 (6th Cir. 1914) (appellate court similarly limited). Where, as in this case, a jury's undifferentiated lump sum damage award[20] is made up of a number of properly compensable items and one noncompensable item, use of remittitur involves judicial correction of a jury's verdict by a process of determining "an unknown fraction of an unknown portion of an unknown whole," *Niebel*, 214 F. at 958. This goes beyond the traditional bounds of the device for correcting jury excess and impermissibly impinges upon the right of the defendant "to have the damages assessed by a jury under proper instructions by the court." *Jacoby v. Johnson*, 120 F. at 488. To correct this error there was, in unfortunate consequence, but one recourse for the trial court and even more unfortunately there is now for us but the same recourse[21] - to require a new trial on the damage issue as the defendant's due. *Id.*[22]

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[20] It is this aspect that distinguishes the instant case from those cited by plaintiff as support for the court's use of remittitur here. In both *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975), and *Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976), remittiturs were upheld in wrongful death actions on the basis that the awards were excessive in their pain and suffering components. In neither, however, had the court erred in submitting this as a compensable item and in both the juries returned special verdicts which broke out the exact amounts awarded for this item. In these cases therefore the maximum amounts attributable to the challenged components were known and the remittitur was simply to reflect a jury excess as to those separable components.

[21] We cannot find the error harmless, as the plaintiff suggests we might, on the basis that the remitted award lies clearly within a permissible total range of properly compensable items. The very problem which makes remittitur improper here is that neither we nor the trial court has any possible way of knowing what amounts may have been assigned by the jury to the various items. For all we can tell the amount assigned the uncompensable item may have bitten into the outer limit of amounts properly, but not necessarily, assigned to compensable items. Under the state wrongful death statute, N.C. Gen. Stat. § 28A-18-2(b) (4) (1981 Supp.), and the court's instructions, several of these are unliquidated.

[22] The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered on appeal it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiffs' motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as the law of the case. *See* F. James & G. Hazard, *Civil Procedure* § 11.5 (2d ed. 1977).

V

The judgment is affirmed in all respects save that respecting the Weston wrongful death claim. As to that claim the judgement is reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART;
REVERSED AND
REMANDED IN PART.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

The overburden on our federal judicial system is no little matter. Judge McMillan faced an aggravated strain on the orderly functioning of his court as an aftermath of a tragic airplane crash. Eastern Airlines flight 212 on September 11, 1974 plummeted to earth near Charlotte, North Carolina, killing 69 passengers and 2 crew members. Nine passengers and 2 crew members survived.

The following lawsuits piled up in the United States District Court for the Western District of North Carolina, threatening a massive legal traffic jam:

1. The action of Richard Arnold IV for personal injuries;

2. The action of Francis C. Mihalek for personal injuries;

3. The action of Helen Rae Weston, as executrix, for the wrongful death of her husband, Lewis D Weston;

4. The action by The Aetna Casualty Company and other insurers of Eastern Airlines under the Federal Tort Claims Act, 28 U.S.C. § 2674, against the United States, and under North Carolina common law against four air traffic controllers, claiming negligence which assertedly caused the crash.

The claims of the insurers sought indemnification or contribution for settlements made with more than 70 other victims of the crash or their next of kin.

In the Arnold and Mihalek cases, Eastern Airlines impleaded the United States, claiming that the air traffic controllers had negligently contributed to the accident. Eastern acknowledged its own liability for compensatory damages in all three accident cases but denied liability for punitive damages and put the three plaintiffs to their proof as to the amounts of compensatory damages.

Obviously, if each of the actions were separately tried, it would take months to dispose of all the litigation generated by a single incident. Some cooperation designed to relieve the situation took place. The parties did not contest the consolidation for trial of the Arnold, Mihalek and Weston cases.

Judge McMillan decided, however, that things must go further in that direction. He, *sua sponte*, but over the objection of Eastern Airlines and of the insurance companies, ordered *all* the cases consolidated.

To try all the cases together admittedly presented problems of some substance. First the consolidation of the three accident cases with the claims of Aetna and the other Eastern insurers seeking indemnification or contribution necessarily meant a disclosure to the jury that Eastern Airlines was insured, and that insurance carriers, rather than Eastern Airlines itself, would bear all or a substantial portion of any award to Arnold, Mihalek or Weston. It is, of course, well established that such information should, to the greatest extent possible, be concealed from the jury. *E.g.*, *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980); *Langley v. Turner's Express, Inc.*, 375 F.2d 296 (4th Cir. 1967); *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E.2d 316 (1965). *See* Fed. R. Evid. 411. ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully.").

Second, the insurance companies, to quantify their claims, would have to bring out just what they had paid in settlement to crash victims or their next of kin. Those awards totaled almost $22 million - an *average* recovery of over $314,000 - and could well influence the jury to apply some kind of victim fungibility rule ("If the loss of Jones injured his family to the extent of $314,000 certainly Smith's -- or Weston's -- family should be treated no less handsomely"). Of course, the peculiar and varying facts of each case should be determinative, with no attention paid to what some other unfortunate victim got.

I am ready to assume, for the purposes of this case that, despite difficulties which customarily would dictate separate trials, consolidation of all the cases was, nevertheless at least theoretically proper, in view of the great dislocations that otherwise were in store for the Western District of North Carolina. Fed. R. Civ. P. 42(a). But, by the same token, the very elimination of customary safeguards, regarded as necessary to insure fairness in the courts,

imposed a heightened need to insist on scrupulous fairness in all other aspects of the trial of the consolidated cases. Otherwise the Fed. R. Civ. P. 42(b) mandate to the district court that it conduct, if necessary, separate trials to avoid prejudice would be consigned to the dead letter heap.

Eastern Airlines was the one from whom customary safeguards, for reasons of overriding exigencies, were withdrawn. It did not, as the cases proceeded through trial, receive scrupulously fair treatment. Quite to the contrary, it was subjected to abusive and overreaching behavior recognized by Judge McMillan himself as excessive -- beyond the normal leeway allowed counsel under the excitement and tension of a hotly contested trial.[1]

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[1] Some examples of improprieties are set out here. Mr. Hemric, representing Richard Arnold, had this to say to the jury:

> I'm asking, I'm, begging for your sympathy for this man and for all the passengers on that plane . . . They [the plaintiffs] are begging for your pity.

Mr. Diehl, also counsel for Richard Arnold, asked the jury to put itself in plaintiff's shoes:

> Let's talk about compensation a minute. After much squabbling, we got in the photos of the airplane crash, the heat, the wreckage, the fire, the destruction, Richard Arnold--what a guy just out of an airplane looks like burned, burned over 47 percent of his body, third degree, second degree, first degree. We've had a little sunburn. I'm light-skinned. I don't need to do anything but poke my head out and I get burned. Perhaps you've had similar experiences, and Solarcaine takes the pain away. Put a little squirt on and you're okay. You imagine being fried in Eastern Airlines' kerosene and how that feels . . . . He fought and kicked and got out of the plane. What difference does it make how he got out? It's a miracle that he got out of the plane. They would rather him not have gotten out of the plane. It would be so much easier, but he got out of the plane, and he got out of the plane after being subjected to something that I can't conceive, watching other people waving their hands as they burned to death.

He later argued:

> I want to use the time I have left to, again, approach the theme of common sense and logic and tell you what I think is the most illogical thing of this trial. The most, the thing to me that makes the least common sense--and I have in my own mind dubbed it Eastern's bad joke--I refer you to the cop-out defense of Eastern Airlines, the attitude that by coming into this courtroom and saying, we admit negligence. We're sorry. We know our pilots crashed the plane. You caught us, caught us in a technicality. They misread an altimeter. We have two of our ace guys up there, ace pilots, and you caught us in this slight transgression and so, for that reason, give

them some small amount of compensatory damages and, by the way, folks, there they are, the real culprits, murderers' row over there, the guys that did it. We're sorry, but what we really want to do is cop-out. We want to put the blame on somebody else. We want to sue the air traffic controllers individually for all the carnage and horror we caused. I think that defies logic and common sense. It made Scott Crossfield [witness for plaintiffs] sick. It makes me sick, and, members of the jury, I hope in the bottom of the pit of your stomach it makes you sick that these people would think that they can pull that in a court of law. It is outrageous. It is exemplified by what you saw. Frank McDermott, the man with the bionic ears, he hears things on cockpit voice recorder tapes that nobody else hears, and he comes here to tell you that he hears them to make you think that these pilots were busy flying the airplane, and he hears things on air traffic control tapes to make you think that these guys sat idly by and watched the bird crash and did nothing about it. It is to me the ultimate disgrace of failure to accept responsibility. It's the kind of logic that brought you Leo Marshall. Wonder how long they had to look for a Mr. Marshall? He said he was hired October 24th. That's over five years after this plane crash. They must have searched the countryside for somebody who had been in the air traffic control tower and who would come in and say, I read the reams of paper--it must be that high--and I find in those reams of paper a duty to watch airplanes all the way down, and I also find, based on what I've heard in this courtroom, that these guys breached that duty. Well, folks, for 40 bucks an hour, you can probably get almost anybody to say anything. I don't think there was a bit of merit in anything he said. It's irrelevant to my lawsuit, but it defies logic, and it tells you the attitude, the attitude, the attitude that's still here. I think their strategy backfired. I think it destroyed in your minds the credibility of the great white knight corporation, Eastern Airlines; and if McDermott and Marshall didn't destroy it, then the star witness of the trial, excuse me, I'm getting ready to say something bad about Frank Borman. Please forgive me. The star witness of the trial, Frank Borman, exemplified everything that I'm about in this case. From the moon ride to the TV ads and wherever you see him in the newspapers and magazines, he had the audacity and gall to walk into this courtroom and to tell you the cockpit conversation had absolutely nothing to do with the crash of the plane. We didn't call Frank Borman . . . . [T]hey needed the luminescence, the glow, John Golding's new-found hero to come here and impress you . . . . That pompous, he's been to the moon. Congratulations. I've been to Waxhaw, big deal. I'm not an astronaut. I'm not the President of Eastern Airlines, but his attitude made him the star witness of this case, folks. He is why they haven't learned a lesson, he and Captain Brady . . . Their conduct. Daniels and Reeves, what they did in that airplane is in wanton and reckless disregard of the rights and safety of the passengers of the airplane. I would be astounded if you don't find that, and I think that's all you need to find; but Borman and Brady, if you want to go back to where that kind of logic comes from, that's where you go. You go right to the top of the airline. The buck stops there. Those guys in 1979 are condoning the very thing that killed 72 people five years ago. It's gross negligence of the pilots and it's gross negligence of this almighty corporation. It's double gross negligence . . . . Captain Brady, the seed, just like you said, Howard, here

negligence . . . Captain Brady, the seed, just like you said, Howard, here comes the oak tree. He told you I was going to say it. He planted the seed of a misread altimeter. Well, I don't think it was the seeds of a misread altimeter. I think what was going on there had been planted long ago. It was cockpit complacency. It was lack of discipline in the most gross, worst sort of way. It is exemplified in 1972 by flying into trees, taking off on the runway in Greensboro in the slush, hold onto your wing, honey, with the stewardess in the cockpit, killing people in the Everglades flying that plane into the ground, a year earlier in Charlotte whacking that 30-foot pole 3500 feet short of the runway, two special surveillances by the FAA, a road show. Did you see it? Where was the road show they bragged about? You didn't see it and Jim Daniels didn't see it, but they made money. They're making money. In 1973 they lost 36 million dollars. In 1974, the year they burned these folks, they made 5.6 million dollars. Need a figure for punitive damages? That is their profit that year, 1974. Did they learn a lesson? No, they're whacking them into the trees in Houston three months later, running off the runway in Buffalo three months later, and in June, 1975, they killed 112 human beings in New York. They learned a lesson. That's the year they lost 50 million dollars, but they are still here, folks. They bounced back from a setback of an economic nature . . . . Well, I say this to you, it was no seed of a misread altimeter. By the time these guys got around to crashing 212, maiming those people, killing those people, it was an oak tree of indifference, and you ought to cut it down. You ought to crash it to the earth the same way they crashed 212 and, if that appeals to your emotions I hope it does. It's time to stop it. They have not learned. They are here in '79 with the same defense they had five years ago, a misread altimeter. What other aspects of the great oak--McDermott, Leo Marshall--a theory that the air traffic controllers should have been watching and waiting. They should have known Reeves and Daniels were turned loose on the rest of society that morning. It's a mind-set that comes into this court and tells you that if other people crash airplanes it's okay for us to crash airplanes. It's got big, strong branches, this old oak that you need to take down, with witnesses in it like Sandy Sanderson, the pilot who flew the plane into the bay, National pilot. He flew the plane into the bay, and they brought him to say it's okay to fly the plane into the bay. Maybe that's why they wanted to acquire National Airlines, wanted to get Sandy on the payroll. Can you imagine getting in an airplane one morning, an Eastern jet, and they come on, welcome aboard Eastern Airlines, Captain Sanderson, Captain Daniels in the cockpit. Instead of passing out coffee, I assume they would roll down and hand out altimeters for the passengers. How sick would you be with that kind of logic? . . . If you want to give them a message you're going to have to hit them in the pocketbook in a way they understand. Killing people and maiming people is something they have gotten immune to as a part of doing business.

Mr. Pangia, representing the government, stated:

Then they have the nerve to come in here - look at the caliber of the evidence - they come in here and put another pilot on the stand that says, yes, I went with my bus, speeding down the road, driving recklessly, and

I crashed and I killed a couple of people. It happens all the time. Like a bank robber taking the stand and bringing in another bank robber and saying we rob banks all the time, it's okay. I haven't robbed a bank for three weeks now, I don't think I should be punished. That's the testimony you heard here. And the tragedy of this case, the tragedy of this case, ladies and gentlemen, is not just what happened here. This is not some recalcitrant teenager or some hoodlum out in the street that says it's somebody else's fault, or a lot of hoodlums go out and rob people or a lot of people drive recklessly. This is an attitude endorsed by a major corporation of coming in here and trying to pull a cop-out. It's an attitude of a major corporation and when we tolerate that in this country, it's the beginning of the end.

You know what this case here is all about? This case is all about a bus driver, taking passengers on in the bus, driving down the street, speeding and driving recklessly, and having a crash and killing and maiming people, and then the bus driver goes to the police station and sues the policeman for not catching him on the radar trap. That's what this case is all about. Then yesterday I hear Mr. Barwick come up here and talk about fairness, oh, be fair to us, that you should be fair, we shouldn't be punished for our wrongdoings. 35 million, 960 thousand 8 hundred 68 dollars plus interest against each one of these individuals [the air traffic controllers], plus interest. They also sued for costs. They also want them to pay for costs of this whole shooting match. That's what they sued them for. Fairness they talk about. Don't hurt us, we're just a little poor airline, with leverage of two million dollars and, as the evidence showed, offered to buy National Airlines for 342 million dollars, and they say that is going broke. Treat us fairly, but sue them, get them for 35 million, nearly 36 million dollars each. I guess they figure they could borrow it.

And then they talk about the fairness, about the settlements that they have made, and that they are suing for their settlement in part they want from the air traffic controllers. They were dragged into a courtroom. The government was not involved in that case. Eastern was dragged into the courtroom and there was a case. They did not want to pay, those passengers had to sue them, and then they talk about fairness.

Now Mr. Barwick, when he came up here to argue, didn't mention that Eastern as well as its insurers is looking to pass the buck to these air traffic controllers. He didn't mention that. Maybe he's ashamed of it, and rightfully he should be because it's not fair to come up here and try to make you feel sorry for Eastern Airlines while doing what they're trying to do to these people for doing their job. Yes, I'm angry. And then they couldn't understand why the plaintiffs here, the people that were injured in this terrible accident, people that were hurt, lost loved ones in this terrible accident, why they have not sued the air traffic controllers. That was beyond their comprehension. Why, they haven't come up with some kind of a reason. Well, maybe they're honest.

Mr. Smiley, representing all three plaintiffs, argued:

We all heard those tapes long before the decision to file this lawsuit was

If such abuses had taken place where each of the Arnold, Mihalek and Weston cases was separately tried, or where, while those three cases were consolidated the remaining cases were not,[2] the existence of insurance and the knowledge of recoveries by other victims would not have been thrown into the jury's pot. Probably then corrective action by the district judge with respect to abuses by counsel would have sufficed to insure the doing of justice. Whether instructions to disregard and scoldings of counsel are sufficient to counter the prejudice of improprieties by counsel is a matter which customarily falls within the scope of the trial judge's discretion.

But here all the flexibility for accommodating to and neutralizing such prejudice had been exhausted at the outset by the imposition on Eastern Airlines of the not insubstantial weight of disclosure of insurance and of the amounts paid to others. Indeed, the counsel committing the improprieties even seized on the opportunities to enmesh, and thereby enlarge, the two areas of probable prejudice. Among the blatantly improper brayings were the following

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> made. The reason we did not sue the government is an extremely simple one. They aren't liable, and we have a duty to this Court and our clients not to undertake to sue people or the government when there isn't any liability. It's a duty imposed upon us as officers of the court, and we believe it, and that's why we didn't do it, and we wouldn't do it today.

And Mr. Pangia argued again:

> I pray that you view this evidence, understand it sufficiently to do the right things here. Mr. Rutherford, or the gang over here has an hour and a half after me. I will not have a chance to come back and refute. Those are the rules which we have laid out. So this is the last time I have to talk to you, and I just pray that you end this three year nightmare for these gentlemen [the air traffic controllers]. Their reputation in the community, facing their families, you know what it's like to go home with a lawsuit like that to live with for three years. They have been literally held as hostages for three years. Try to go to a bank and make a loan, try to buy a car and have to explain . . . .
>
> COURT: I don't believe we heard any evidence about that.
>
> MR. PANGIA: End the nightmare, please.

[2] Consolidation for trial of the insurance company claims and the Eastern Airlines impleader would have been possible, without the threat, promptly followed by the actuality, of prejudice to one of the parties. That approach would have permitted the handling of all cases and claims in only two trials. The situation, it seems, developed into one where a good idea was pushed one step too far.

statements by counsel representing all three plaintiffs:

> Finally, Richard Arnold. Evidence of the injury are again met with insults. The mind is a wonderful things, suggests John Golding. After a while, you forget the pain. Isn't that marvelous? Isn't that a wonderful thing to come before you and say? If that were true, why should we compensate anybody under any conditions for the pain which they suffer? Let's just wait a while. Let's engage in a long lawsuit and drag our feet for five years and, by then, I guess we're pretty well assured he would have forgotten all of the pain, every bit of it; and, as to the innuendoes about the motivation of the plaintiffs in this lawsuit and his reference, which I believe to be improper, to other lawsuits which were settled, some of which were settled--I might add--while the jury was out, let me say this to you. There has been no offer to settle Mrs. Weston's case, as long as I have been the attorney for the case.

On objecton by Eastern Airlines, the district judge admonished counsel to "stay off subjects which are forbidden for counsel to argue to juries whether they are true or false," and instructed the jury that offers of settlement were irrelevant to the issues before it. He concluded with the statement:

> You better obey. The next time there won't be just a reprimand. This is not an idle suggestion Mr. Smiley. . . . Counsel are forbidden to discuss that subject any more in this case.

Yet subsequently, during closing argument, Mr. Diehl, attorney for one of the plaintiffs, stated:

> He [Mr. Golding] represents with Mr. Rutherford [attorney for Aetna] the 19 insurance companies that have been busy buying off the claims of the other people and he's finally run up against three human beings sitting right there and three lawyers that ain't going to be bought.

Later, in a discussion between the court and counsel, out of the presence of the jury, about how to remedy the situation occasioned by those remarks, the court observed:

> COURT: I should have smacked him about 500 bucks

before he was allowed to argue another word to the jury, but I thought this was the quickest and simplest.

In sum, it seems that Judge McMillan was carried away with enthusiasm for the seeming reasonableness and efficiency of his consolidation plan. He was so committed to it that he could not bring himself to abandon it, even when outrageous excesses by counsel for the individual plaintiffs turned trial to travesty.

What appears to have happened is that counsel for the three plaintiffs and for the government, learning the district judge's final determination that there was to be one trial and one trial only,[3] knew that they could safely practice gross abuses, in the certain knowledge that they ran no risk that the district court would employ that extreme, but ultimately efficacious, sanction, namely declaration of a mistrial. While whether to grant a mistrial lies within the trial judge's discretion, it constitutes abuse of discretion to reveal, in advance, that practically no conceivable circumstances would lead him to invoke the remedy of mistrial. To do so predictably will cause the trial judge to lose control of the situation. That, I submit, is inescapably what happened here. To reread the egregiously unprofessional utterances (see my footnote 1 and the text of my dissent at slip op. 11) establishes, beyond peradventure, that such was the case.

In sum, the case was one where prejudicial comments by counsel, in the totality of the circumstances, necessitated reversal and a new trial. *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 758-59 (6th Cir. 1980).[4]

In the majority's opinion we observe an open invitation to outrageous misbehavior by trial lawyers. Each plaintiff's lawyer may, from now on, be expected to ask: "What is a mere slap on the wrist, if, in exchange, I enhance my client's recovery by hun-

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[3] On August 23, 1979, well before the commencement of trial, the district judge stated:

> I intend to have only one more trial on all the fact issues in these cases. I intend to try them all in three weeks or less.
>
> . . . . I do not intend to have any separate trials later on the issues between the original defendants on the one hand and the air line controllers and the government on the other. That case will be disposed of in the same factual inquiry.

[4] Thoroughly analyzed in S.J. Peters, *Improper Argument of Counsel: City of Cleveland v. Peter Kiewit Sons' Co.*, 12 Toledo L. Rev. 761 (1981).

dreds of thousands of dollars? Others will come to me for representation on the basis of the size of the recovery, not on whether I behaved decently in court." As politicians know, in like circumstances, the apt response is: "I don't care what you say about me, as long as you spell my name correctly."

Counsel now are insulated from any adverse consequences of utterly unprofessional conduct so long as they are careful to keep the invectives in the gutter. The majority places its *imprimatur*, its *nihil obstat*, upon "uninspired flights of invective." Slip op. at 29. The maintenance of proper courtroom standards has suffered a grievous blow from this day's work. I pray for its recovery.

In light of all of the abuse heaped on Eastern Airlines, my conscience is shocked that it should be compelled to pay damage awards extracted from the jury through resort to such offensive tactics. Thus I would reverse, in the *Arnold*, *Mihalek*, and *Weston* actions, for a new trial limited to fixing the proper amounts of compensatory damages. Since the jury, even despite the prejudicial atmosphere of the trial, to Eastern Airline's detriment, determined that no punitive awards would be proper, that portion of the judgment should not be disturbed. The improper, incurable prejudice all flowed in one direction.

Furthermore, as to the claims against the United States and the air traffic controllers, I perceive no sufficient prejudice respecting those quite different causes of action to necessitate a new trial. The claims against the United States had to be tried non-jury, and the air traffic controllers were fully relieved of liability by reason of the judgments entered on the claims against the United States, irrespective of how they came out, 28 U.S.C. § 2676. Judge McMillan was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been.

I concur with Judge Phillips in his conclusion that, for the reasons he has advanced, the Weston case must be remanded for retrial of the compensatory damages issue.

It is a source of regret to me that similar remands are not ordered in the Arnold and Mihalek cases. With hindsight we can clearly see that the consolidated cases should have been separated into two groups for purposes of trial. As they stand we are to end up having two trials anyway. Arnold and Mihalek should, with the Weston executrix, relitigate the amounts of compensatory damages they are entitled to and thereby receive fair and impartial judgments, not the ones flawed by prejudice which, by the majority's decision, they will retain.

APPENDIX E

Order Granting Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Dec. 23, 1982

RICHARD ARNOLD, IV,
Appellee,

v.

EASTERN AIR LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 80-1245

FRANCIS C. MIHALEK,
Appellee,

v.

EASTERN AIR LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 80-1246

ORDER

The petition for rehearing and suggestion for rehearing in banc on behalf of Eastern Air Lines, Inc., and the responses thereto having been read and considered; a poll on the suggestion for rehearing in banc having been requested; and Judge Ervin having recused himself, Judges Winter, Russell, Widener, Murnaghan and Chapman having voted to grant rehearing in banc and Judges Hall, Phillips and Sprouse, together with Judge Butzner who voted before he took senior status, having voted to deny rehearing in banc, it is ORDERED that the petition for rehearing in banc is granted, subject to the condition that the parties file supplemental briefs, in accordance with a schedule to be fixed by the Clerk, on the issue of whether rehearing in banc has been properly authorized and be prepared to argue their views when the case is reached for reargument. *See, e.g., Zahn v. International Paper Co.*, 469 F.2d 1033 (2 Cir. 1972), *affirmed on other grounds*, 414 U.S. 291 (1973); *Boyd v. Lefrak Organization*, 517 F.2d 918 (2 Cir. 1975); *Schenker v. Baltimore & Ohio RR.*, 374 U.S. 1, 4-5 (1963); Comment, *Federal Jurisdiction and Practice*, 47 St. John's L. Rev. 339, 348 (1972). After briefing and argument, the court will make a final ruling as to whether the rehearing in banc has been properly authorized.

FOR THE COURT

/s/ Harrison L. Winter
Chief Judge

APPENDIX F

En Banc Opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

RICHARD ARNOLD, IV,

Appellee,

v.

EASTERN AIR LINES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 80-1245

FRANCIS C. MIHALEK,

Appellee,

v.

EASTERN AIR LINES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 80-1246

Argued February 8, 1983 Decided July 8, 1983

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL,

PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, Circuit Judges, and BRYAN, Senior Circuit Judge, sitting en banc.

PER CURIAM:

By way of summary the Court states its conclusions on the issues considered at the *en banc* rehearing which took place on February 8, 1983:

1. The vote of five members *for*, four *against*, and one member *disqualified*, and hence not voting, which had previously taken place, constituted a determination by a majority of the circuit judges who are in regular active service ordering rehearing *en banc*.

On that issue, the vote was six (Chief Judge Winter, Judge Russell, Judge Hall, Judge Murnaghan, Judge Sprouse, and Judge Chapman) *for* and two (Judge Widener and Judge Phillips) *against*.

2. The judgments of the district court in the *Arnold* and *Mihalek*[1] personal injury actions against Eastern are reversed and remanded for retrial on the issue of the proper amounts of compensatory damages.

On that issue, the vote was five (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman) *for* and four (Judge Hall, Judge Phillips, Judge Sprouse and Judge Bryan) *against*.

It should be noted that Judge Ervin was disqualified and therefore did not participate in any of the proceedings in the case. Furthermore, Judge Bryan, as a Senior Circuit Judge who sat as a member of the three-judge panel, took part in the consideration as to issue 2. pursuant to 28 U.S.C. § 46(c). Judge Bryan, there being no statutory authorization for him to do so, did not take part in the consideration as to issue 1.

The several opinions of Judges Widener, Hall, Phillips and Murnaghan which follow are devoted to the various rationales which prompted the votes of the several members of the Court.

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[1] The petition for rehearing with suggestion for rehearing *en banc* of Eastern Air Lines granted by us was restricted to those two cases. The *Weston* personal injury action had, by unanimous action of the three-judge panel, for distinct reasons peculiar to that case, been reversed and remanded for a new trial as to the proper amount of compensatory damages. No petition for rehearing has been sought, or granted, with respect to the *Weston* case.

MURNAGHAN, Circuit Judge:

In the United States District Court for the Western District of North Carolina, there were consolidated for trial several actions arising as a consequence of an Eastern Air Lines airplane crash at Charlotte, North Carolina on September 11, 1974:

1) Three personal injury actions against Eastern.

2) An action for indemnification or contribution by insurance carriers of Eastern against the United States and four air traffic controllers.

3) Third party claims against the United States for contribution filed by Eastern in two of the accident cases.

The panel of the Fourth Circuit which heard the appeal affirmed judgments on behalf of the plaintiffs in two of the accident cases, reversed and remanded the third for a new trial on the issue of compensatory damages and affirmed judgments in favor of the United States and the air traffic controllers. *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186 (4th Cir. 1982). There was a dissent at the panel level limited to the affirmance of awards for plaintiffs in the two accident cases. *Id.* at 206.

The case is now before the Court as a consequence of Eastern's request for rehearing *en banc*, contesting the judgments for the two accident case plaintiffs.

As a matter preliminary to consideration of the issues on the merits, we have to decide whether the case has in fact achieved the status of one entitled to *en banc* rehearing. The Federal Rules of Appellate Procedure in Rule 35 provide that a "majority of the circuit judges who are in regular active service may order that an appeal . . . be . . . reheard by the court of appeals in banc."

At the time of voting on the suggestion for *en banc* rehearing there were ten individuals occupying positions with the court satisfying description as circuit judges in regular active service. When the poll was taken, one court member, Judge Ervin, recused himself, did not vote, and has since that time remained disqualified. Of the nine remaining circuit judges in regular active service five (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman) voted in favor of rehearing *en banc;* four circuit judges in regular active service (Judge Butzner, Judge Hall, Judge Phillips and Judge Sprouse) voted to deny rehearing *en banc.*

The court tentatively determined that the case had achieved *en banc* rehearing status, and now, following consideration of arguments from counsel, confirms that tentative determination. Joining the author of this opinion in that conclusion are Chief Judge Winter, Judge Russell, Judge Hall, Judge Sprouse and Judge Chapman. Judge Widener and Judge Phillips are of the contrary view and would hold that the vote on the suggestion of an *en banc* rehearing failed for want of a majority of the circuit judges in regular active service. Five, Judge Widener and Judge Phillips contend, do not consititute a majority of ten.[1]

At the outset, it should be observed that the majority's decision has been taken for the purposes of the present case. It is, of course, entitled to the precedential weight attaching to any decision of the court. However, in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 4-5 (1963), there appears a suggestion that the area may well be one in which achieving fulfillment of our administrative responsibilities would allow us by rule to select, as a quorum for purposes of ascertaining a majority, when votes on suggestions for hearings or rehearings *en banc* are taken, either (a) all judges in regular active service, including those disqualified for the purposes of the particular case or (b) all judges otherwise in regular active service who are not, for the purposes of the particular case, disqualified from participating in any way.[2] Accordingly, we do not, by our decision today preclude a possible change in practice, brought about by adoption of a rule of general applicability. Nor, or course, do we have occasion to determine whether applicable statutory language would permit or forbid such a change in practice. The uncertainties are not minimized by the Supreme Court's observation in

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[1] In light of the decision we have reached, it is unnecessary to decide, and we purposely have avoided deciding, whether the taking of senior status by Judge Butzner on November 1, 1982, after the voting on whether to rehear the case *en banc* had been completed, but before an order was promulgated recording the vote, changed the equation so that the vote was, whatever view was taken, five of at most nine, and hence, in all events, a majority. *Cf. United States v. Martorano, 620 F.2d 912, 920 (1st Cir. 1980); United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960) *Burns v. Estelle*, 626 F.2d 396, 397 (5th Cir. 1980).

[2] In *Shenker*, it was said that the denial of rehearing *en banc* fell within the discretion of the Third Circuit "to devise its own administrative machinery to provide the means whereby a majority may order such a rehearing." *Western Pacific Rr. Corp. v. Western Pacific Rr. Co.*, 345 U.S. 247, 250 (1953).

Western Pacific Rr. Corp. v. Western Pacific Rr. Co., 345 U.S. 247, 260 (1953):

> The *en banc* power . . . is . . . a necessary and useful power — indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate.

We now have no general rule, and must decide without the benefit of such a generally promulgated guide to practice,[3] the proper result in the case *sub judice*.

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[3] The other circuits have not been uniform in their decisions. The Eighth Circuit has clearly gone one way, providing in its Local Rule 16(a) as follows:

> *How Ordered; Panel for Hearing or Rehearing.* A majority of the judges of this court in regular active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may order a hearing or rehearing en banc upon request by a party or judge of this court in regular active service. The panel for the hearing or rehearing consists of the judges of this court in regular active service who are actively participating in the affairs of the court at the time of the hearing or rehearing and who are not disqualified in the particular case or controversy.

Cf. Ford Motor Co. v. FTC, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982). Other circuits, without being so unequivocally explicit, have adopted and construed rules requiring that disqualified judges be counted for purposes of a quorum when the question is whether or not to hear or rehear a case *en banc*. For example, the Third Circuit has, by its Rule 2(3) essentially picked up the language of the applicable statute, 28 U.S.C. § 46. We are informed that the interpretation in the Third Circuit has uniformly been to require, to set a case for *en banc* hearing or rehearing, a majority of all judges in regular active service, even those altogether disqualified in the case concerned. Respecting the Third Circuit, we note that *Shenker* was a case from that Circuit where rehearing was held to have failed, when two judges *abstained* and counting them as voting against rehearing resulted in a 4-4 split. The Supreme Court regarded the abstainers as voluntary non-voters, however, and that distinguishes the facts in *Shenker* from those of a case dealing with a disqualified judge who is under a binding compulsion not to vote.

The Sixth Circuit by order in a specific case which made clear that it was dealing with the question in the circumstances of a disqualified judge, *Clark v. American Broadcasting Co., Inc.*, No. 80-1476 (6th Cir., Oct. 22, 1982), and the D.C. Circuit and the Seventh Circuit, in *Copper and Brass Fabricators Council, Inc. v. Department of Treasury*, No. 81-2091 (D.C. Cir. 1982) and *Porter County Chapter of Isaac Walton League v. Atomic Energy Comm.*, 515 F.2d 513, 533 (7th Cir. 1978), have also required for a majority more than one-half of all the judges in regular active service, including those "disqualified" (6th Cir.), "not participating" (D.C. Cir.) or "taking no part" (7th Cir.).

We find the answer primarily in the language of the applicable statute. 28 U.S.C. § 46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service . . . .[4]

Concentrating on the second sentence of § 46(c), we perceive insoluble difficulties in any other reading of the statute, at least in its present posture, without any contrary indication from a rule or regulation, than that there shall be excluded, for quorum ascertainment purposes, any disqualified judge when a vote on a suggestion for hearing or rehearing *en banc* takes place. Judge Ervin has not sat when the case was reheard *en banc*. No responsible suggestion could be made that he, who was disqualified and consequently took no part whatever in the *en banc* rehearing, the decision of which is here reported, acted otherwise than properly. 28 U.S.C. § 455 ("Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred.[5]

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[4] The balance of § 46(c) deals with a problem peculiar to the Fifth and Eleventh Circuits and further provides for participation in the decision of a case reheard *en banc* on the merits by a senior circuit judge who sat on the panel once a vote on a suggestion for rehearing *en banc* participated in solely by circuit judges in regular active service has conferred *en banc* rehearing status. It is in light of that statutory provision that Judge Bryan has participated in the *en banc* rehearing in the present case, but not in the determination whether the case should have an *en banc* rehearing.

[5] *Cf.* the language of 28 U.S.C. § 46(b):

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, . . .

The recent amendment by the Federal Courts Improvement Act of 1982 added the language evidencing Congressional understanding that a recused or disqualified judge cannot sit. That approach finds collateral support also in 28 U.S.C. § 47 which forbids a trial judge to hear or determine an appeal from a decision reached by him.

The court *en banc*, therefore, could not have had among its members Judge Ervin. He, in recusing himself, has not infringed the statutory mandate that *all* circuit judges in regular active service *shall* comprise an *en banc* court. Any seeming contradiction between court action and statutory language is at most apparent; it is not real. There is a ready explanation. Judge Ervin is regular and active,[6] and as a general proposition is in service. However, should he, or any other regular, active member of the court, recuse or disqualify himself at any time, he is *out of service* insofar as that particular case is concerned. To disqualify means to debar legally. *See* Webster's New International Dictionary, 2d ed., p. 753. That is synonymous with lack of legal capacity, i.e., with inability to serve. Hence, Judge Ervin properly did not sit during the *en banc* rehearing, because, for the particular case, he was not one of the circuit judges in regular active service.

With that proposition established, we turn to the language describing the body, a majority of which is required to order hearing or rehearing *en banc*. In § 46(c), in a sentence immediately preceding the one stating who shall sit in an *en banc* hearing or rehearing, the body is described in substantially identical terminology: "the cirucit judges of the circuit[7] who are in regular active service." Again Judge Ervin does not meet the description because, for purposes of the present case, he is "out of service." It would obviously contradict the purpose of disqualification to treat the situation precisely as though the disqualified judge had voted "No." The canon of construction is well established that words repeated within the same statutory section have an identical meaning in the several places employed. *E.g., United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978), *cert. denied*, 436 U.S. 930 (1978).

We are not unmindful of authority to the contrary. *Zahn v. International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972), *affirmed on other grounds*, 414 U.S. 291 (1973).[8] However, the opi-

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[6] *I.e.*, not senior or retired. *United States v. American Foreign Steamship Co.*, 363 U.S. 685, 688 (1960); Moody v. Albemarle Paper Co., 417 U.S. 622 (1974).

[7] The words "of the circuit" appear in the first sentence of § 46(c), but not in FRAP 35 where the language of that first sentence is repeated. (The following, or second, sentence from § 46(c) describing who shall sit on an *en banc* court is not contained in FRAP 35.)

[8] *Zahn* was applied in *Boyd v. LeFrak Organization*, 517 F.2d 918 (2d Cir. 1975).

nions in that case, both majority opinions and a dissent, concentrated on the policy considerations and no not allude to the language of the second sentence in § 46(c) or to the problems of directly conflicting meanings assigned to the same language, appearing cheek by jowl in adjacent sentences in a single statute. It is perhaps possible that members of the Second Circuit concentrated their attention, reasonably enough, on FRAP 35(a). That rule, headed "When Hearing or Rehearing in Banc Will be Ordered," restricts itself, so far as present purposes are concerned, to a setting forth *in haec verba* of the language of the first sentence of § 46(c). Consequently, the conflict between the conclusion reached in *Zahn* and the language of the second sentence of § 46(c) was not so readily apparent.

The result later reached in *Zahn* had been described as the correct one in *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U.L. Rev. 563 (Part I), 726 (Part II) (1965):

> Section 46(c) vests the power to provide for en banc proceedings exclusively in the active circuit judges of the circuit. Even if an active judge is disqualified from participation in an en banc decision, he still should be able to vote on the question of whether to hear the case en banc. A vote to sit en banc involves considerations of effective judicial administration and does not constitute a vote on the litigant's claim. Also, allowing the disqualified judge to vote on the en banc question has the further advantage of allowing the full membership to determine more accurately the likelihood of subsequent disagreement with the panel decision.
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> *Id.* at 736.

However, the logic is badly frayed inasmuch as it is assumed that a recused judge would vote on whether a case should be heard or reheard *en banc* even though disqualified from voting on the merits.[9] The Fourth Circuit has simply not operated in that fashion,[10] and

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[9] To accept as persuasive the opinion in the New York University law review article would inferentially criticize Judge Ervin for not voting on the suggestion of a poll on rehearing *en banc*, and indeed criticize outselves for agreeing that he should, since disqualified, not vote.

[10] Chief Judge Friendly of the Second Circuit, the disqualified judge in *Zahn*, did not vote on whether there should be a rehearing *en banc*.

we do not perceive how a disqualified judge could do so without infringing the rule that he should take no action which would possibly affect the outcome of a case. To count as a vote his non-vote might well be decisive as to whether the case would be reheard.

Better reasoned, we find, are two law review notes favoring a result contrary to that reached in *Zahn:* Comment, *Federal Jurisdiction and Practice,* 47 St. John's L. Rev. 339, 348 (1972) ("Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of *Zahn* should have carried the day."); Comment, *In Banc Procedures in the United States Courts of Appeal,* 43 Fordham L. Rev. 401, 420 (1974).[11]

Since a disqualified judge under § 46(b) is explicitly recognized as unable to sit on a three member panel and since a disqualified judge manifestly, for the reasons heretofore given, cannot sit on an *en banc* hearing or rehearing, it would ascribe to Congress a petulant inconsistency, devoid of any apparent explanation, were we to hold that a judge, though disqualified, should be treated as though he were part of the quorum for the purposes of the vote on whether to hear or rehear the case *en banc.* The inconsistency aspect would also apply should we turn to general customary practice. *See* H. Robert, *Robert's Rules of Order* 339 (Section 43) (S. Robert ed. 1970):

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[11] The Judicial Conference of the United States in 1973 took action on the subject which we regard as inconclusive. On the one hand, it expressed a clear preference for the reading of § 46(c) which we have concluded is correct. On the other hand, it indicated that a statute might be required. The report of the 1973 proceedings provided:

> EN BANC HEARINGS
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> The Conference approved a proposal for legislation to amend Section 46(c) of Title 28, United States Code, and authorized the transmittal thereof to the Congress. The amendment would make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to *en banc* a case. Under the present statute, there must be a vote of a majority of the circuit judges in regular active service which has been construed to mean that if there is a vacancy a majority of the judges actually on the court will suffice but if a judge disqualified himself there must still be a majority of the entire membership voting for an *en banc* sitting.

> Majority Vote-the Basic Requirement [T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a *majority vote*. The word *majority* means "more than half"; and when the term *majority vote* is used without qualification - as in the case of the basic requirement - it means more than half of the votes cast by persons legally entitled to vote, *excluding blanks or abstentions*, at a regular or properly called meeting at which a quorum is present.

(Emphasis supplied.)

Accordingly, we have proceeded to rehear the case *en banc*. As a consequence, five court members (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman) have concluded that there were errors mandating reversal for new trials as to the correct amount of compensatory damages of the judgments below in the Arnold and Mihalek accident cases.[12] Judges Hall, Phillips, Sprouse and Bryan, dissenting, would affirm. Undisturbed since no *en banc* rehearing was sought, or because we did not regard them as meriting *en banc* reconsideration, however, were the aspects of the consolidated case as to which the panel opinion was unanimous: (a) the award of a new trial as to compensatory damages in the Weston accident case and (b) affirmance of the judgments entered in favor of the United States and the air traffic controllers on the claims for indemnification or contribution.

The rationale for the majority decision *en banc* is largely to be found in the panel dissenting opinion. *See Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 206 (4th Cir. 1982.) It would serve no purpose to repeat. However, it must be added that, although the panel dissent restricted itself to a description of perceived reversible error solely on the basis of improper conduct of counsel for the plaintiffs and the United States, we *en banc*, see substantial error in the joinder for trial or refusal to sever of the accident cases on the one hand and the indemnification or contribution actions on behalf of Aetna and other insurers of Eastern.

Of course, our judicial system could hardly function if appellate courts liberally indulged in second guessing of trial judges. The trial

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[12] Eastern Airlines does not contest liability, restricting controversy to the amount of compensatory damages.

judges are on the scene, and properly are allowed extensive discretion in deciding such questions as whether the disclosure that a defendant is insured, while normally a grounds precluding consolidation or mandating severance, may be overborne by other considerations such as those relied on by the panel majority.[13] Nevertheless, a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice. *Molever v. Levenson*, 539 F.2d 996, 1003 (4th Cir. 1976), *cert. denied*, 429 U.S. 1024 (1976). Consolidation, or refusal to sever, where prejudice results under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error. *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967).

There is no need for us to announce a rule of universal applicability, imposing as an absolute necessity the separate trial of every case which is a candidate for consolidation if consolidation results in revelation to the jury of insurance coverage for a defendant.[14] Nevertheless, looking at the facts and circumstances of the particular case, we are satisfied that knowledge of Eastern's insurance coverage, and awareness of the approximate quantum of recovery for virtually every other crash victim, implanted in the minds of the jury resulted in prejudice, almost surely prejudice from the outset and certainly prejudice after the trial had wended its way to conclusion.

Had the cases not been consolidated, or after consolidation for discovery had they been severed for trial, there would have been no opportunity for counsel for one of the crash victims to make his uncouth observation about: "the 19 insurance companies that have been busy buying off the claims of the other people." 681 F.2d at 211.

Looking alone at the size of the verdicts for compensatory damages

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[13] In this case "the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." 681 F.2d at 193.

[14] See, however, *Langley v. Turner's Express, Inc.*, 375 F.2d 296, 297 (4th Cir. 1967) (" . . . [W]e are in accord with Virginia law, which has consistently held that evidence as to insurance coverage is inadmissible and prejudicial to a defendant and the admission of such testimony or argument of counsel disclosing insurance coverage is reversible error.").

in the three accident cases: Arnold ($3,027,500), Mihalek ($1,137,500) and Weston ($847,000), they cause the average for 70 other victims, $314,000, to pale by comparison. While peculiar characteristics of the three cases might afford an explanation, the other possibility simply cannot be eliminated that the jury, freed from any restraining concerns that it should not irresponsibly capability to continue to do business, contemplated the pockets -- so deep as to seem virtually bottomless -- of large insurance companies (several of whom, it was emphasized, were "foreign") as a capacious source for benefactions rather than as only a spring supplying just compensation for injuries actually suffered.

In my panel dissent, I was "ready to assume, for the purposes of this case that, despite difficulties which customarily would dictate separate trials, consolidation of all the cases was, nevertheless, at least theoretically proper, in view of the great dislocations that otherwise were in store for the Western District of North Carolina." 681 F.2d at 207. However, since consolidation "necessarily meant a disclosure to the jury that Eastern Airlines was insured, and that insurance carriers, rather than Eastern Airlines itself, would bear all or a substantial portion of any award to Arnold, Mihalek or Weston" (681 F.2d at 207), I emphasized that consequently there was "a heightened need to insist on scrupulous fairness in all other aspects of the trial of the consolidated cases." 681 F.2d at 208. In the actual proof of the pudding, it has now become clear to me that the fairness required was not possible to attain. So I am entirely content to join with my four colleagues in a determination that the consolidation also amounted to reversible error.

That then presents the question of whether Aetna and the other insurers as parties to cases also held to have been improperly consolidated logically are likewise entitled to reversal and remand for a new trial. We are satisfied that the answer to be given is in the negative, for the consolidation prejudiced Eastern, but not the insurers. The fact of insurance had to be disclosed in the insurers' cases, and the fact of indemnification of Eastern by its insurers would not prejudice the insurance companies.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN CONFORMITY WITH THE VIEWS HEREIN EXPRESSED.

WIDENER, Circuit Judge, concurring and dissenting:

I

At the outset I should say that I am able to concur in the result of this case only because it was heard in two separate and distinct parts, and amounts of two cases heard by en banc courts of different composition. The procedural aspect of the case with respect to en banc determination was heard by the judges not disqualified in regular active service, while the case on the merits of the appeal was heard by them and, in addition, Judge Bryan, a Senior Judge. Had that part of the case with respect to en banc determination been determined the way I think it should have been, then we would not have reached the merits for en banc determination would have been denied for failure of a majority.

As to the matters in the opinion of the majority with respect to en banc determination, I respectfully dissent for reasons which I will set forth below.

The fact that I concur in the grant of a new trial to Eastern does not mean that I associate myself with all of the opinion of the majority.

I concur in that part of the opinion of the majority reversing for a new trial on account of consolidation of the cases as well as the result obtained by the majority. If the subject were properly preserved, I do not disagree with the majority opinion as it adopts the reasoning of the dissenting panel opinion with respect to the conduct of the trial and especially the statements of counsel during oral argument and perhaps elsewhere. As Judge Phillips has correctly set forth in his dissenting opinion, however, there were no sufficient contemporaneous objections made to the actions of the attorneys. Neither were there sufficient, if any, contemporaneous motions for mistrial. The absence of contemporaneous objections and motions for mistrial I think precludes consideration on appeal. It simply deprives the other side of a fair trial for an attorney to sit through an inflammatory argument which could have been and should have been stopped instantly, and, then, after the argument is over, make objection to it. At the very least, such lack of action deprives the trial court of an opportunity to see that the trial is conducted in a calm and fair manner. I can think of no other aspect which more demands the enforcement of the contemporaneous objection rule and the rule requiring motions for mistrial than does argument of counsel. Not to enforce that rule simply opens the door for turning trials into shouting matches, and I would at once close it in this

en banc decision. If that were the only subject at hand, I would affirm the judgment of the district court because of lack of contemporaneous objections and motions for mistrial.

II

A.

I do not subscribe to the majority's theory that the *Western Pacific Case* has contributed to our uncertainty.

B.

Congress, pursuant to its constitutional power to establish inferior courts, has provided that the Courts of Appeals shall hear cases "By a court or panel of not more than three judges, unless a . . . rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c). After this case was decided by a panel of three judges, the appellee, Eastern Airlines, petitioned for rehearing and suggested rehearing en banc. A poll of the ten circuit judges of this circuit in regular active service yielded five votes to grant rehearing, four votes to deny rehearing, and one disqualification. Because five votes does not constitute a majority of ten, the number of circuit judges in regular active service at the time of the poll, I respectfully dissent from the court's decision to rehear this case en banc.

In response to various problems concerning the proper role of retired judges in the affairs of the Courts of Appeal, Congress enacted a bill, proposed by the Judicial Conference of the United States, the purpose of which was to clarify the status of circuit and district judges who retired from regular active service. Act. of Nov. 13, 1963, Pub. L. 88-176, 77 Stat. 331. S.Rep. No. 596, 87th Cong., 1st Sess., *reprinted in* 1963 U.S. Code Cong. and Ad. News, 1105, 1106. This legislation defined the composition of each of the various Courts of Appeal as consisting of the circuit judges of the circuit in regular active service, that is, those judges not retired. Pub. L. 88-176, § 1(a) (codified at 28 U.S.C. § 43(b)). The Act then amended 28 U.S.C. § 46(c) to put control of the en banc proceedings in the hands of "a majority of the circuit judges of the circuit who are in regular active service." Id. at § 1(b). All the amendment did, as it affects us here, was to insert "regular" between "in" and "active" in the then existing statute.

Prior to the enactment of that amendment, the Supreme Court

had discussed en banc courts in *Textile Mills Corp. v. Commissioner*, 314 U.S 326 (1941), and in the *Western Pacific Railroad Case*, 345 U.S. 247 (1953), as well as in *Shenker* hereinafter mentioned. *Textile Mills* held that the statutes with respect to the composition of the Courts of Appeals did not prohibit a Court of Appeals of more than three judges from hearing a case en banc, and the *Western Pacific* case construed the predecessor of the statute involved here as simply a grant of power to order hearings and rehearings en banc and to establish the procedure governing the exercise of that power. 345 U.S. at 267. Its holding was simply that a Court of Appeals could not restrict the initiation of the en banc procedure to the court itself, and that a decision striking out an application by a party for en banc consideration was error. In discussion the Court did construe § 46(c) as neither forbidding nor requiring each active judge of a Court of Appeals to entertain each petition for en banc consideration, which is entirely consistent with its later ruling in *Shenker*.

In *Shenker v. Baltimore & Ohio RR Co.*, 374 U.S. 1, 4-5 (1962), the Supreme Court affirmed a decision of the Third Circuit which required an affirmative vote of an absolute majority of the active members of the court and which did not require each member of the court to vote on petitions for hearing en banc. At the time Shenker filed his petition for rehearing en banc, eight judges were in active service. Four of the eight voted to rehear the case; two voted not to rehear; and two abstained for reasons that do not appear either in the Supreme Court's or the Court of Appeals' opinion. *See Shenker*, 303 F.2d 596, 600 (1962). On this vote, the Third Circuit denied the petition for rehearing en banc, and the Supreme Court found no error in the denial. 374 U.S. at 4-5. The Supreme Court also found no error in the Third Circuit's procedure for polling its judges, which did not require a judge to vote on a petition. Id. at 5. The Court found such a procedure to be within the discretion of the Court of Appeals.

I do not construe *Shenker* to hold that a court may by rule set up the requirement of an absolute majority of the circuit judges in regular active service and then to have founded its decision upon the rule. In the first place, so far as I ascertain, there was no rule in the Third Circuit except a near literal copying of the words of the statute.[1] It was merely a practice of that circuit which was given effect by decision in the *Shenker* case. Thus, the decision of the Third Circuit was that an absolute majority was required, and this was affirmed by the Supreme Court. Both the holding of the Third

Circuit and the Supreme Court are entirely consistent with the wording of the statute. Second, even discounting the two *Shenker* abstentions, the vote at the very best for the petitioner was four for and two against if we count the two abstentions as votes against granting the petition. It is at once apparent that four to two is a majority of those judges not disqualified, and so the fact situation presented to the Supreme Court in *Shenker* is the same as presented to us here. Since the *Shenker* case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does, and it did not do so, I suggest that, because the adoption of the majority view here would have changed the result of the *Shenker* case, the Supreme Court has rejected the position the majority now embraces.

The Second Circuit decided a similar question in *Zahn v. International Paper Co.*, 469 F.2d 2033, 2040 (2d Cir. 1972) aff'd on other grounds, 414 U.S. 291 (1973), in a way that supports my contention that the motion for rehearing in this case failed for want of a majority. When the petition for rehearing was considered in the Second Circuit, the court consisted of nine judges. At the time, there was one vacancy.[2] One judge did not vote because of disqualification. Of the seven judges who voted, four voted to rehear the case, and three voted not to rehear. Despite this four-to-three vote in favor of rehearing en banc, the Second Circuit denied the petition "for want of an affirmative vote 'by a majority of the circuit judges of the circuit who are in regular active service.' " *Zahn, supra* at 1040, quoting 28 U.S.C. § 46(c). The Second Circuit has adhered to its literal reading of § 46(c). E.g., *Boyd v. Lefrak Organization*, 517 F.2d 918 (1975) (rehearing en banc denied; four affirmative votes to rehear, three negative votes, one disqualification, one vacancy).

Besides, *Zahn*, a majority of circuits which have confronted the problem now before us have read § 469(c) [sic] as requiring an absolute majority of the circuit judges in regular active service to order a rehearing en banc. *Copper and Brass Fabricators Council, Inc. v. Department of Treasury*, 679 F.2d 951 (D.C. Cir. 1982), *reh'g*

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[1] *Rules* of the U.S. Court of Appeals for the Third Circuit, Aug. 19, 1948 with amendments of Oct. 1, 1951, Rules 4(3) and 5(3). Cf. the same *Rules* effective July 1, 1968, Rule 2(3), which again amounts only to a literal reading of the statute.

[2] I take it as agreed by silence among the Courts of Appeals that a vacant judgeship does not count one way or the other. The statutes speak of "judges," not judgeships.

denied, unpublished order, No. 81-2091 (Aug. 3, 1982) (five votes to rehear; three votes not to rehear; two judges not participating in the matter); *Clark v. American Broadcasting Co*, 684 F.2d 1208, 1226 (6th Cir. 1982) (rehearing denied; five votes in favor of rehearing, four against, and one judge disqualified); *Curtiss-Wright Crop. v. General Elec. Co.*, 599 F.2d 1259 (3d Cir. 1979) (rehearing denied; four votes to rehear en banc, three votes not to rehear, two judges not participating); *Porter County Chapter of Isaac Walton League v. Atomic Energy Comm'n*, 515 F.2d 513, 533-34 (7th Cir. 1978) (rehearing denied; four votes for rehearing en banc, three votes against, one judge taking no part), rev'd on other grounds, sub nom. *Northern Indiana Public Service Co. v. Porter County Chapter of Isaac Walton League*, 423 U.S. 123 (1975). *See also* INTERNAL OPERATING PROCEDURES FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ch. IX, B.4.b. (rev. Sept. 4, 1980) (effect of non-response to a poll of circuit judges on decision whether to rehear a case en banc is the same as a vote not to rehear). Accord Maris, *Hearing and Rehearing In Banc*, 14 F.R.D. 91, 93 (1954) (the Third Circuit follows § 46(c) literally, hearing or rehearing en banc is ordered only with the concurrence of an absolute majority of the circuit judges in regular active service).

A minority of the circuits that have dealt with the question have authorized en banc review upon less than an absolute majority of the circuit judges in regular active service. In the Eighth Circuit, "a majority of the judges . . . in regular active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may order a . . . rehearing en banc . . . ." RULE 16(a) OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (1981).

Although the Ninth Circuit apparently does not reveal the results of a poll of its members on whether to hear or rehear a case en banc, one of its members has described the circuit's policy in a footnote to a dissent from the denial of rehearing en banc. *Ford Motor Co. v. Federal Trade Comm'n*, 673 F.2d 1008, 1012, n. 1 (9th Cir. 1982) (Reinhardt, J., dissenting). The Ninth Circuit rehears cases en banc only when a majority of its active members who are not disqualified vote to do so.

The First Circuit, in *United States v. Martorano*, 620 F.2d 912 (1980), granted rehearing en banc when the vote was two for, one against, and one vacancy. Thus, that court has joined neither the majority nor minority.

Strong practical considerations also support the plain reading of the majority requirement of § 46(c), and of FED. R. APP. P. 35(a), which was adopted pursuant to the statute. "The principal utility of determinations by the courts of appeals *en banc* is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . . . " *United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting from Maris, Hearings and Rehearings in Banc,* 14 F.R.D. 91, 96 (1954). In this connection, since the very direction of the court is in the hands of itself assembled in banc, less than a majority does not hold so steady a course.

Section 46(c) allows a circuit to achieve uniformity within itself on questions of importance by acting as a full court rather than as a three-judge panel. *Zahn, supra,* at 1041 (Mansfield, J.). If fewer than a majority of its judges in regular active service may order en banc determination, as is now the case with us, the en banc procedure will not so surely achieve a uniform body of law, relatively immune from shifting changes in membership or disqualifications in the court. Furthermore, an important control on the invocation of the en banc process, so costly in time and resources, will be lost. Given that en banc hearing is an extraordinary measure, see F.R.A.P. 35(a), the requirement of an absolute majority of all the judges in regular active service would help limit en banc review to those cases most meriting exceptional treatment.

In 1973, the Judicial Conference of the United States approved a proposed bill to amend § 46(c) to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to *en banc* a case." 1973 *Reports of the Proceedings of the Judicial Conference of the United States* 47. Although by advocating such legislation it expressed its approval of the rule that this circuit adopts today, the Judicial Conference acknowledged that Congress was the competent lawmaker in this area, and, further, that the law was to the contrary, otherwise no legislation would have been necessary. The Director of the Administrative Office of the United States Courts transmitted a draft of the proposed legislation to both houses of the 93d Congress, which in turn referred the draft to the respective Committees on the Judiciary. 119 CONG. REC. 32,129 (House of Representatives) (Oct. 1, 1973); 119 CONG. REC. 32,153 (Senate) (Oct. 1, 1973). The draft legislation was introduced as H.R. 10805, 93d Cong., 1st Sess., 119 CONG. REC. 33,430 (Oct. 9, 1973), and was referred to the Sub-

committee on Courts, Civil Liberties, and the Administration of Justice, which took no action on the bill other than to request an opinion from the Department of Justice. The bill thus died in the 93d Congress.

Since 1973, two Congresses have seen fit to amend §46(c), without addressing themselves to the specific problem posed by the Judicial Conference's draft legislation. *See* The Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 205, 96 Stat. 25, 53 (1982); Act of Oct. 20, 1978, Pub. L. 95-486, § 5, 92 Stat. 1629 (1978). If any inference is to be drawn from the subsequent legislative history of § 46(c), it is that Congress, the only body competent to change the statute, was aware of the construction of the statute sought to be changed by the Judicial Conference and chose not to change it.

Despite the plain language of the statute and its literal interpretation by a great majority of the circuits, the majority insists that the en banc court comprises the judges in regular active service other than those judges who are disqualified. It would so read the statute because to require an absolute majority would have the effect of treating a disqualification or an abstention as though it were a no vote. Mindful of a judge's duty to disqualify himself whenever his impartiality might reasonably be questioned, 28 U.S.C. § 455, the majority takes the position that to treat a disqualification as a no vote would allow a judge improperly to affect the determination of the cause from which he is barred. Slip op. at 14.

I think the majority's concern is legitimate but misdirected.

The clear import of 28 U.S.C. § 455 is to prohibit a judge's participation in the determination of a case within the purview of that statute. Although a disqualification may be viewed as a no vote, that effect is entirely incidental. We must assume that a judge will recuse himself whenever required to do so, and when he is disqualified, the incidental effect is always one way, namely, to leave the absolute majority requirement in effect with one less possible vote to rehear.

But the majority's reading of the statute does not cure the mischief it assumes. Under the majority decision, five votes to rehear are needed in this case only because one judge disqualified himself. If that one judge had not disqualified himself, then six votes would have been needed to rehear the case. The result of that one judge's disqualification was to reduce the number of votes needed to rehear the case en banc from six to five. Viewed from the other side of the case, then, that judge's disqualification had the immediate effect, albeit unintended and incidental, of a yes vote. The disqualifica-

tion made en banc review easier to obtain by one vote, and according to the majority's logic, it is as though the disqualified judge voted yes and is affecting the outcome of the cause from which he is barred, thereby contravening 28 U.S.C. § 455.[3] Thus, I suggest the majority's reasoning, that its construction of § 46(c) avoids a conflict with § 455, is patently self defeating, and reveals the correct conclusion which is that § 455 has nothing to do with how this case should be decided.

I thus respectfully dissent to the grant of en banc review.

Judge Phillips authorizes me to state that he joins in part II of this opinion.

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[3] In a court with an even number of judges the first, third, fifth, etc., disqualification would affect the number of votes required. In a court with an odd number of judges, the second, fourth, sixth, etc., disqualification would affect the number of votes required. Disqualification of more than one judge is not uncommon in this circuit.

HALL, Circuit Judge, concurring:

I agree with the majority that because of his disqualification Judge Ervin should not be counted in determining whether a majority of active circuit judges voted for rehearing this case *en banc*. In my view, however, the issue of whether rehearing *en banc* was proper in this instance can be resolved on a more narrow and equally compelling ground. On November 1, 1982, Judge Butzner took senior status before the order granting rehearing *en banc* was entered on December 23, 1982. It is true, as the majority opinion points out, that Judge Butzner was in regular active service when he voted on the suggestion for rehearing *en banc*. But, in my view, the fact that he was eligible at the time he voted on the suggestion is irrelevant. The critical time for determining a circuit judge's eligibility to have his vote counted is when the order on the poll is entered. Thus, I conclude that Judge Butzner's vote should not be counted, because when the order granting *en banc* rehearing was entered, he was no longer a circuit judge in regular active service.

I find support for this conclusion in the statute and rule governing *en banc* rehearings, as well as in the applicable case law. 28 U.S.C. § 46(c) reads in pertinent part as follows:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is *ordered* by a majority of the circuit judges of the circuit who are in regular active service. (Emphasis added)

F. R. App. P. 35(a) further provides:

> Determination of Causes by the Court in Banc
>
> (a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may *order* that an appeal or other proceeding be heard or reheard by the court of appeals in banc. (Emphasis added)

The critical verb in both the statute and the rule governing *en banc* review is "order." The power to order a rehearing *en banc* is clearly confined to those circuit judges who are in regular active service. *Moody v. Albemarle Paper Company*, 417 U.S. 622, 626 (1974); *Allen v. Johnson*, 391 F.2d 527, 532 (5th Cir. 1968).

In *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688-89 (1960), the Supreme Court construed the provisions of 28 U.S.C. § 46(c) and concluded that the crucial time for ascertaining a judge's eligibility to participate in an *en banc* decision was fixed by the statute's use of the verb "determined." Based on this construction, the Court held that a circuit judge who assumed senior status after the grant of a petition for rehearing *en banc*, but before the case was decided, was not eligible to participate in the decision.[1]

Applying this same rationale to the present issue, the validity of Judge Butzner's vote can only be determned at the time the *en banc* rehearing was ordered. Because Judge Butzner was not in regular active service on December 23, 1982, when the order in this case was entered, I can only conclude that his vote on the suggestion for rehearing *en banc* may not be counted in determining whether the required majority was attained. Thus, in my view, without even reaching the question of Judge Ervin's status, at the time the order was entered there were at most nine circuit judges in regular active service.[2] Because five voted in favor of rehearing *en banc*, the requisite majority was achieved and rehearing *en banc* was properly authorized.

In all other respects, I agree with the majority's reasoning on the *en banc* portion of its opinion. As for the merits, the majority opinion correctly states that I would affirm the district court. I agree with the result reached in the panel decision.

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[1] In a similar vien is this court's decision in *Mayor & City Council of Baltimore v. Matthews*, 571 F.2d 1273 (4th Cir. 1978). Relying on the Supreme Court's holding in *American-Foreign Steamship*, we concluded in that case that the vote of Judge Craven, who had died after he had concurred in a draft opinion, but before the court's decision was announced, could not be counted in disposing of the appeals.

[2] The judicial vacancy created by Judge Butzner's withdrawal from active service does not count in determining whether a majority exists. *See United States v. Martorano*, 620 F.2d 912, 920 (1st Cir. 1980).

PHILLIPS, Circuit Judge, dissenting:

I respectfully dissent, both from the court's decision to rehear this appeal en banc,[1] and from its ensuing en banc decision on the merits.

The decision to rehear this appeal en banc was in the first place an improvident one tested by principles that should, but did not here, constrain the court's invocation of that extraordinary procedure. procedure.

The decision on the merits, displacing a panel decision which, whatever its merits, was based upon a detailed and fully articulated record review of purely discretionary trial court rulings, is, by contrast, best seen as a blunt, though unadmitted, exercise of the court's supervisory jurisdiction. That appellate power is invoked here to condemn and deter by the most drastic possible means misconduct of counsel which, though concededly egregious when considered in mass and in isolation, is never demonstrated on any principled basis to have been the likely cause of any actual prejudice to the only party favored by the court's en banc decision. The predictable result of this apparently intuitive exercise of raw supervisory power is a correspondingly indiscriminate remand for a new trial that in this multifaceted case introduces a new set of injustices, wholly ignored by the court, affecting parties who have had no real opportunity to suggest them to the en banc court.

On both points more is involved here than the ultimate result in this legally unexceptional diversity case. Each decision trenches upon matters of ongoing institutional concern for which, by these decisions, unfortunate appellate review practices in this court are encouraged and regrettable legal precedent may have been established.

Because of the broader implications of the decision, expression of a dissenting viewpoint on both decisions is warranted. I take the decision to rehear en banc and the decision on the merits in that order.

I

The standards by which courts of appeals are to decide whether to rehear an appeal en banc are concededly not subject to precise

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[1] This is a matter aside from the technical question whether under the controlling statute and rule rehearing en banc was compelled in this case by the vote taken on poll of the court, a question separately addressed in Judge Widener's dissenting opinion.

formulation and wholly consistent application. The controlling rule, Fed. R. App. P. 35(a), implementing the undergirding statutory grant of power, 28 U.S.C. § 46(c), tells us only that the procedure is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." There is enough flexibility built into the very text of this rule - in the word "ordinarily" and in the open-ended expression of "exceptional importance" - that it could not be claimed that the rule itself either compels or excludes rehearing en banc in *any* case.

But of course, we know - as the introductory "not favored" admonition directly tells us - that the procedure is intended by Congress and the Supreme Court to be used sparingly and with careful discrimination, and that some other standard than a purely subjective, eye-of-the-beholder perception of "exceptional importance" should constrain us in the matter. The Supreme Court, which wisely has deferred as a matter of deliberate policy to the courts of appeals' discretion in invoking this procedure, *see Western Pacific Railroad Corp. v. Western Pacific Railroad*, 345 U.S. 247, 269 (1953) (Frankfurter, J., concurring), has, however, adjured caution and circumspection upon us. So we have been reminded by the Court that "*[e]n banc* courts are the exception, not the rule"; that they should be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit," *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960); and that the policy of the en banc rehearing statute is " 'that the active circuit judges shall determine the *major doctrinal trends of the future* for their court,' " *id.* at 690 (emphasis added). *See also Church of Scientology v. Foley*, 640 F.2d 1335, 1338-41 (D.C. Cir. 1981) (en banc) (Robinson, C.J., dissenting).

Notwithstanding these wise admonitions suggesting the existence of objective criteria by which we should discipline ourselves in this matter, it remains the fact that we are constrained only by that discipline. And it cannot be gainsaid that in practical terms the standard for invoking the en banc rehearing procedure remains - to paraphrase Chief Justice Hughes on the Constitution - whatever a sufficient majority of active circuit judges in a particular case considers it to be. For this reason, it is not possible to insist that there

are any cases which are improper "as a matter of law" for en banc rehearing, and of course I make no such claim for this or any case. *See United States v. Lynch*, 690 F.2d 213, 215 n.22 (D.C. Cir. 1982) (Robinson, C.J.).

It is possible, however, to insist that there is a discernible scale of case-types in terms of probable fitness for en banc rehearing. We need periodically - if for no other reason than possibly to stem the tide of almost routine suggestions these days for rehearing en banc[2] - to consider that scale as an aid to principled and sparing invocation of the procedure. This case provides a particularly appropriate occasion for the exercise because it involves the most flagrant disregard of the principles of restraint that the scale teaches.

Without attempting to define in detail the categories of cases most fit for en banc rehearing,[3] it is certain that lowest in the order is that general category wherein the suggestion is only of non-constitutional error leading to an arguably unjust or incorrect panel decision having no significant precedential implications. As to such cases, former Chief Judge Kaufman has expressed the general view that a "judge should [not] cast a vote for reconsideration by the entire court merely because he disagrees with the result reached by the panel . . . Rule 35 was not adopted to provide that luxury." *Gilliard v. Oswald*, 557 F.2d 359, 359 (2d Cir. 1977). This bespeaks a general perception, with which I certainly agree, that it is not the intended function of the en banc procedure simply to provide in effect another intermediate appellate court to review for "mere" panel error. *See Western Pacific Railroad*, 345 U.S. at 275 (Jackson, J., dissenting) (use of procedure for this purpose likened to "appeal from the three-judge court to a swollen circuit court"); *Church of Scientology*, 640 F.2d at 1341 (Robinson, C.J., dissenting); *United States v. Robinson*, 560 F.2d 507, 526 (2d Cir. 1977) (Feinberg, J., dissenting). This case is obviously in that general

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[2] *Cf. Western Pac. R.R.*, 324 U.S. at 270 (Frankfurter, J., concurring) (noting in 1952 "a growth in the tendency to file petitions for rehearing in the courts of appeals").

[3] The rule itself specifically identifies only the most obvious type, that wherein the panel decision conflicts with another, thereby threatening the "uniformity of [the circuit's] decisions." Fed. R. App. P. 35(a) (1). Certainly also high in any reckoning of "special importance" must be cases presenting difficult or novel constitutional issues having potentially wide application. Beyond these, "special importance" becomes less manifest. *See generally Church of Scientology*, 540 F.2d at 1341-42 (Robinson, C.J., dissenting).

category.

Within this general low-fitness category of mere error-correction cases, there is concededly the potential in any case that the decision suggested for en banc reconsideration not only involves prejudicial panel error, but affects "doctrinal trends" or involves matters of significant public interest as well, so that "exceptional importance" justifying en banc rehearing on the latter basis is present. Even within this category of "correction-plus" cases, however, further gradations of potential "importance" can be identified and should be kept in mind.

At the highest level of potential importance in the general low-fitness category must be cases involving misapprehensions or misapplications of significant legal principle, even of non-constitutional dimensions. These principles may in some cases be of such precedential moment that en banc rehearing is justified, not "merely" to correct an arguably erroneous panel result, but to bring to bear the full court's consideration of a major doctrinal problem having serious precedential implications for circuit, and possibly national, law. *See, e.g., Adams v. Proctor & Gamble Manufacturing Co.*, 697 F.2d 582 (4th Cir. 1983) (en banc) (effect on individual Title VII claims for consent judgment in EEOC action). *See generally Walters v. Moore-McCormack Lines*, 312 F.2d 893, 894 (2d Cir. 1963) (en banc) (Lumbard, C.J.).

Certainly at a distinct level below such "important legal precedent" cases are those wherein the dispositive issues are purely factual or discretionary ones and it is suggested only that the panel incorrectly upheld or rejected trial court fact findings or found or failed to find abuse of trial court discretion. In neither type case is a legal issue with significant precedential implications likely to be involved.

In fact-dispositive cases, even if the controlling legal principles are of the greatest significance, rehearing en banc simply to consider a suggestion of panel error in its review of trial court findings of predicate facts is not warranted under the procedure.[4] *See, e.g.,*

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[4] It is of course possible that in a "fact-review" case the real question is not simply one of panel *judgment* in applying the agreed standard for fact-finding review, but is of the proper standard to be applied. This is itself a matter of legal principal, and a court might properly consider it necessary to address that significant legal principle en banc. Such an issue was, for example, recently the dispositive one in *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982) (appropriate standard for review of ultimate finding of employer motivation under Title VII).

United States v. Collins, 462 F.2d 792, 802 (2d Cir. 1972) (en banc) (rehearing en banc improvidently granted where appeal turns solely upon validity of trial court factual determinations that controlled application of unchallenged *Miranda* principle).

At an even lower level - indeed by any reckoning at the very lowest level of potential importance - are those cases, such as the instant one, wherein the suggestion is only of panel error in affirming trial court discretionary rulings.[5] Here the en banc court will simply be second-guessing a panel's judgment call that was itself required to be greatly deferential to that first made at the trial court level. Such cases are not likely ever to provide a fit occasion for invoking the en banc procedure, no matter how egregiously "wrong" the panel's judgment call affirming trial court discretion may appear even to a sizeable majority of the full court. No legal principle will emerge in clarified, altered, or corrected form from such an en banc decision.[6] No general precedent of ongoing value in the exercises of trial court discretion or of appellate review of such exercises is likely to result, given the inevitably high fact-specificity of the trial court rulings.[7] The only possible justification for rehearing such appeals en banc will be that found in the narrow, one-time-only "correction" of an "incorrect" or "unjust" panel decision affirming a trial court's discretionary conduct of a particular trial whose exact dimensions will never be repeated.

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[5] Cases wherein panel decisions have affirmed trial court discretion are generally even less appropriate for en banc rehearing than are those in which panel decisions have found abuse of discretion. The latter are at least likely to have established "as a matter of law" a *per se* limit on trial court discretion that could have important precedential effects. Affirmances, however, will typically avoid defining the specific limits, holding merely that the challenged action lies within undefined, permissible bounds, and will therefore have no effect beyond the immediate case. Additionally there is the fact that en banc reconsideration of panel affirmances threatens the joint view of two "lower" judicial levels rather than one of two opposing views. *Cf. generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2819 (1973) (pointing up greater appellate diference owed trial judge discretionary denials than grants of new trials for claimed jury error in assessing evidence).

[6] Unless, perchance, the appropriate standard of review of the ruling - a legal principle - is itself drawn in issue. *See United States v. Robinson*, 560 F.2d at 518-19 (Oakes, J., dissenting).

[7] Unless, perchance, a narrow *per se* rule of abuse of discretion has been applied by the panel and is challenged in the suggestion for rehearing en banc. ***But see supra*** note 5.

Even if the possibility of justification in some discretion-review cases be admitted, the value of mere one-case "correction" in a particular case must always be weighed carefully in the balance against weighty conflicting considerations that underlie the basic admonition that the procedure is "not favored." Those conflicting considerations are the obvious and simple ones identified by Justice Jackson in the course of pointing out why all rehearings en banc for merely one-case corrective purposes are disfavored:

> [They] are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to [the Supreme] Court. Delay, cost, and uncertainty, which take their toll of both the successful and the unsuccessful, the just and the unjust litigant, are each increased by an additional appeal to a hybrid intermediate court.

Western Pacific Railroad, 345 U.S. at 273 (Jackson, J., dissenting); *see also Church of Scientology*, 640 F.2d at 1341 (Robinson, C.J., dissenting) ("drains judicial resources [and] leads to multiplicity of opinions [resulting in] inability to offer authoritative guidance").

With these considerations in mind, the en banc decision in this case confirms every point that makes rehearing en banc in this type case, of all types, most inappropriate. Laying aside the question whether the decision may have "corrected" a sufficiently grave panel error to justify on that basis alone invoking the generally disfavored procedure - a matter addressed in Part II - the decision predi ably serves none of the dominant institutional purposes of the procedure.

It obviously resolves no intra-circuit conflict of decisions. It neither announces, abandons, nor clarifies any legal principle that might bear upon general "doctrinal trends" in circuit law. It lays down no precedent likely to provide helpful guidance either to the district courts in exercising discretion or to this court in reviewing exercises of discretion in future cases of general comparability. It deals with no controversy of such general public importance, as opposed to public curiosity, that full-court imprimatur is desirable simply to encourage greater public confidence in the end result. It simply substitutes the judgment of a one-vote majority of the nine-member en banc court for that of a one-vote majority of a three-member panel on purely judgmental questions of trial court discretion not

likely ever to recur in even generally comparable form. Raw power obviously exists in the larger majority to do this; the real question is the propriety of the power's exercise in this or other cases of the general type.

If one looks to the opinion itself - principally to the panel dissent which, it is said, contains the basic rationale for the en banc decision - it is obvious that the "exceptional importance" of the case was thought to lie only in the special venality of counsel's misconduct, the special degree of dereliction in the trial judge's failure to curb or correct it, and the special degree of panel error in failing to set things right at the appellate level. It could be asserted, I suppose, that on the root matter - counsel misconduct - the decision does embody a sufficiently important general principle and set a sufficiently important and helpful precedent. The principle, presumably: that counsel misconduct sufficiently egregious will taint and require setting aside a verdict; the precedent: that repetitions of this particular degree will in this circuit have that result, even if it takes en banc rehearing to achieve it.[8] The general principle is of course unquestionable. But it has never been in doubt and con-

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[8] Achieving the narrow precedential effect of deterring comparable counsel misconduct by failing to reward that here is in fact given as a specific justification for the en banc decision. In the incorporated panel dissent it is suggested that the "[panel] majority's opinion [is] an open invitation to outrageous misbehavior by trial lawyers."

As a colorful means of giving weight to a strongly felt dissenting opinion, this dire prediction is an unexceptionable exercise of the judicial prerogative. But of course it overstates. Countless appellate decisions declining to order new trials for clear counsel misconduct have gone on the books without causing the general ruin this suggests.

Every decision rejecting challenges to marginal ethical conduct or questionable trial tactics of counsel contains some risk of condonation, but cases have to be decided up or down. It would be quite as reasonable now to suggest that the en banc decision necessarily condones trial court sandbagging tactics. Certainly a signal of some sort is given that trial counsel may with impunity raise no objection on trial to opposing counsel's conduct and take their chances on a favorable verdict, secure in the knowledge that if the verdict is unfavorable this court will nevertheless entertain their belated perception of prejudice (particularly if presented by different appellate counsel), paying no attention to what is probably the clearest on-the-scene indication of the degree of prejudice actually involved. *See Arnold v. Eastern Air Lines*, 681 F.2d 186, 195, 200 § [sic] n.15 (4th Cir. 1982) *(Arnold I), superseded, Arnold v. Eastern Air Lines*, _____ F.2d _____ *(4th Cir. 1983) (en banc)*.

vening an en banc court simply to emphasize its continued vitality is not a provident use of heavily pressed judicial resources.

Just as the legal principle is too general to justify two levels of appellate review to insure its "correct" application in a particular case, so the only legal precedent that could result from the effort will necessarily be so narrowly fact-specific as to be positively mischievous rather than helpful (if taken at all seriously). I predict on that score that the surest consequence of this decision will be a spate of appeals, petitions for rehearing, and suggestions for rehearing en banc in which we are invited to liken or contrast in minute, fine-honed detail various examples of counsel misconduct with that in this case. The result of that, I further predict, will be that so far as its precedential effect is concerned, this decision will quickly either be regretted or disregarded - equally unfortunate consequences for the stability and predictability of our processes.

There remains a possibility that, in all fairness, should be considered. Even conceding the general unfitness of this type case of en banc rehearing, and conceding that in a particular case no justification exists beyond one-case error correction, the injustice of a particular panel decision might be so grave and so manifest that a court armed with the power to set it right en banc could not responsibily [sic] fail to do so. I concede the point. *See United States v. Lynch*, 690 F.2d at 215 n.22.

Where this is to be the sole basis for rehearing en banc, however, a special discipline is compelled for making the collegial decision that grave and manifest injustice rather than merely arguable panel error is involved. Fortunately, one reliable means of discipline is readily available. It lies in the very cast of the court's vote on the en banc rehearing question. In a case where every member of a court other than the majority of a divided panel votes to rehear en banc, the sheer vote balance suggests a collegial judgment that injustice going beyond mere error is not merely arguable but manifest, and the validity of individual perceptions to that effect as reflected in the individual votes is by the overall vote confirmed. If, on the other hand, a vote to rehear en banc in such a case is close - particularly, as here, a bare majority - a reconsideration of the propriety of en banc rehearing is suggested for a collegial court by the very closeness of the vote. The strong indication from such a closely divided corporate judgment is that whatever of panel error is arguably involved, it does not amount to injustice so grave that its correction by the full court's consideration is both necessary to

insure justice and essentially foreordained by the vote.

In such a case, and I suggest in this case, a court should yet step back. It is never too late to determine, on the basis of newly revealed aspects of a case, that an original vote to rehear en banc was improvident when considered in a new light shed by later developments. *See, e.g., United States v. Collins*, 462 F.2d at 802-03; *See, also Church of Scientology*, 640 F.2d at 1344-45 (Robinson, C.J., dissenting). This is classically such a case, and even at this stage of the proceedings, I think we should, upon reconsideration, deny the suggestion for rehearing en banc and let stand as the court's judgment the panel decision. *See id.*

Aside from insuring in the end a more principled administration of the disfavored en banc procedure in this case, this would also yield the proper result on the merits. For, as I believe will be shown in Part II, the *most* that could be said for the en banc decision is that it simply substitutes for any injustice in the panel decision at least equal, and arguably greater, injustices running in the opposite direction. Where this is the only consequence of an en banc rehearing of trial court discretionary rulings, it confirms the improvidence of the initial decision to rehear en banc. It also points up the wisdom of the rule that accords great appellate deference to trial court discretion in balancing the risks of relative injustices (the very essence of discretionary judicial action) in an attempt to achieve the most just solution possible. In such situations, the questionable ability of appellate courts in general to strike any better discretionary balance cautions doubly against the expense and investment of resources involved in two-tiered efforts to do so. *See generally*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957).

This case should never have been wrung through this most dubious process to yield so dubious a substitution of pure judgment calls by so close a final call and with such a new and unexplored injustices.

II

The en banc decision on the merits is, apparently, that largely because of the special risks of prejudice created by trial consolidation the misconduct of counsel took on such special color that the verdicts of all these plaintiffs against Eastern Airlines must be set aside and new trials on those claims ordered.[9] The displaced panel decision rested on a contrary assessment that despite the conceded

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See pg. 32f for footnote 9

impropriety of much of the challenged conduct, a careful review of the record, undertaken with proper deference to trial court discretion, revealed that improper influence of the jury could not be assumed a probable consequence of the misconduct. *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982) *(Arnold I)*, *superseded*, *Arnold v. Eastern Air Lines*, _____ F.2d _____ (4th Cir. 1983) (en banc).

I stand on the panel majority's assessment to that effect. Not only does it reach a more defensible result but, quite as significantly for our ongoing processes, it reflects a more principled process of review for this type case than is reflected in the en banc decision by the court. Because I think the en banc decision is flawed not only in its result but, just as critically, in its apparent process of review and correction, I add some thoughts here on the latter aspect.

A

The en banc decision is - so far as can be discerned from what is said in the two opinions - rested entirely upon a blunt perception that the misconduct of counsel here is so bad that review need not go beyond a simple recognition of its particular degree of impropriety - with remand for new trial dictated as a matter of course because of the degree perceived and the need to deter repetitions. No attempt is made to assess whether, under a careful record review, it must further be assumed that *actual* prejudice to Eastern probably resulted from the misconduct.[10] I understand the court's instinc-

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[9] In its written brief Eastern apparently, though imprecisely, contended both that the damage awards were excessive *per se*, and that counsel misconduct has improperly inflated them, whether or not they were excessive *per se*. The panel opinon considered and rejected both arguments. *See Arnold I, 681 F.2d at 200-04.* During oral argument on the rehearing en banc, Eastern's counsel confined argument to counsel misconduct as a impermissibly inflating factor, correctly pointing out in response to a question from the bench that it was not necessary to prove an award "outrageous" in amount under the test of *Gruenthal v. Long Island R.R.*, 393 U.S. 156 (1968), to show that it was improperly inflated by counsel's misconduct. This implicit concession that excessiveness *per se* is not now challenged is apparently reflected as well in the en banc court's opinion which is essentially confined to identifying counsel misconduct as the sole basis for setting aside the verdicts.

[10] The en banc court's decision rejecting the conclusion drawn by the panel majority from the latter's detailed review cannot fairly be taken as, by implication, a comparable review that simply has led to a contrary conclusion. The gist of the en banc court's basis for decision is fairly found in the panel dissent, which in fact is said largely to contain the en banc decision's rationale. *Arnold v. Eastern*

tive first-blush dismay - even outrage - and have expressed my own.[11] But I do not understand the court's failure - as I read its opinion - to ponder more deeply the real issue that follows.

Review of trial court discretion in responding to party and counsel misconduct in jury trials is undoubtedly among the most difficult appellate tasks. *See Arnold I*, 681 F.2d at 194-95. The temptation in review is understandably great to make instinctive judgments that particular misconduct might improperly have influenced a jury because of its obvious capability to do so. But fair review requires a further effort on a principled basis to fathom whether it did in fact probably do so in the particular case.

The reason is obvious. We do not sit as general monitors of the professional conduct of lawyers in trial courts. In the overall scheme of things that important task is given over to others - to the organized profession in general and, in particular trials, to the broad discretion and equally broad final responsibility of trial judges. *See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635 (1971). Not only are we not given the task of general supervision, we are not equipped to do it fairly

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Air Lines, _____ F.2d _____ (4th Cir. 1983) (en banc) (No. 80-1245, slip op. at 17). The unmistakable impression from the panel dissent is that misconduct so egregious is so necessarily prejudicial that this ends the matter and makes detailed review to assess the probability of actual prejudice unnecessary.

The nearest that the en banc majority comes to identifying specifically prejudicial trial court error is in the incorporated panel dissent's conclusion that the trial judge's handling of the case caused him to "lose control of the situation." *Arnold I*, 681 F.2d at 211 (Murnaghan, J., dissenting). This conclusion is rested in turn on the stated perception that when the trial judge announced before trial an intention that there should be but " 'one more trial on all the fact issues in these cases,' " this signalled to plaintiffs' counsel that under no circumstances would the judge declare a mistrial. *Id.* at 211 & n.3. From this it is said, counsel were miscouraged to engage in outrageous behavior, and the judge, locked in by his pre-trial announcement, was made impotent to control it by the ultimate sanction. *Id.* at 211.

With all respect, this analysis simply will not bear record scrutiny in any of its critical elements, starting with the critical meaning ascribed to the "one trial" announcement. Of course the judge was not by this committing himself against mistrial for whatever cause; his meaning was completely different and could not have been interpreted in the critical way the panel dissent has done in retrospective assessment. The whole record in fact belies the serious indictment that - whatever may have transpired - this experienced trial judge ever "lost control" of the case in the way now thought by the majority to require a new trial.

[11] *Arnold I*, 681 F.2d at 195.

and consistently if we undertake it. Aside from other frailties and limitations that beset us as appellate judges in assessing the subtleties of both judicial and non-judicial influences on juries, the only effective sanction we have for correcting misconduct of counsel - ordering a new trial - is not available at all against losing counsel (surely equal culprits over the long haul and the run of cases) and, when invoked against prevailing counsel, is visited mainly upon their faultless clients.

That in the overall scheme it is not given to us to root out this particular evil whenever and however it comes to our attention in cases properly before us may be a matter of deep regret to different ones of us from time to time. But the temptation to range beyond our limited function of reviewing for judicial error should be resisted. The way systematically to resist it lies precisely in doing what I am satisfied was not done here: making pragmatic inquiry past the misconduct into whether improper influence upon the jury from that misconduct can be accepted as a probability, *see City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980), being content to leave to other forces of correction - or to oblivion - any misconduct not found legally prejudicial as well as ethically opprobrious. That exhausts both our responsibility and our power to correct for legal error.

It is critical that such a tough-minded and disciplined inquiry into actual prejudice was not - so far as we are given to understand - considered necessary here. For, as the majority panel opinion demonstrated, such a review rather easily dispels the initial shock effect undoubtedly created, as intended, by appellate counsel's adroit massing, and heavy-handed repetition, of the various discrete instances of counsel misconduct upon which Eastern's appeal was primarily based.

Full recapitulation of the panel majority's review on that score is not appropriate here. It suffices to refer to some of the more obvious perceptions opened by that review and apparently considered inconsequential by the en banc majority: the significance of the extended period of time over which the instances of misconduct massed in appellant's brief actually occurred, *see Arnold I*, 681 F.2d at 195, 200; the numerous, carefully phrased cautionary instructions given by the trial judge designed to screen the jury from improper influences flowing from improper or questionable conduct by counsel for *all* parties, *see id.* at 198-99 & nn.11-13; the fact that the dominant issue in the case was the degree, conceded to be at least "or-

dinary'' negligence, of Eastern's culpability, *see id.* at 197-99; and, most critically, the failure of Eastern's counsel to have made any contemporaneous or other objection at trial to any but a very few[12] of the numerous instances of conduct carefully massed for challenge on appeal, *see id.* at 200.

Because I remain persuaded that on a fair and properly deferential review of the record no prejudicial error resulting from counsel misconduct is shown, I would affirm the Arnold and Mihalek personal injury judgments and otherwise hold with the panel decision.

B

There remains a possibility that should be considered. It is that the en banc decision can be viewed and justified as a valid exercise of the court's supervisory jurisdiction over proceedings in the district courts even if actual prejudice were not demonstrable. As indicated at the outset of this opinion I think this is the most forthright way to view the decision. Because I dissent from the result, however it may be grounded, I address this possibility.

Though the contours of this residual appellate power are understandably vague, it is undoubtedly drawn upon by federal courts from time to time in situations where justice, or the appearance of justice, has been thought to require corrective intervention even though actual prejudice to aggrieved parties cannot be demonstrated or is concededly absent. *See, e.g., Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (tort defendant's verdict set aside for misconduct of jury commission and clerk of court in excluding daily wage earners from jury lists; ''unnecessary to determine'' actual prejudice to plaintiff); *Young & Simon, Inc. v. Merritt Savings & Loan*, 672 F.2d 401 (4th Cir. 1982) (new trial because of two-week interruption,

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[12] The exact number is not clear, but the total is infinitesimal in relation to the instances massed for appellate review. Most significantly, no objection was made at trial to either of the most obvious technical improprieties: the Golden Rule allusion in opening statement and the appeal for sympathy in closing argument. No motion for mistrial was made before the conclusion of jury argument. A motion for mistrial was made following jury argument, but it was confined to the effect of the ''no-settlement-offer'' argument, which was then made the subject of a strong curative instruction and other corrective measures. Of the numerous instances of improper jury argument relied upon by Eastern and the en banc majority, none was made the subject of contemporaneous objection by trial counsel. Perhaps significantly, however, three objections that were made by trial counsel are *not* specifically brought forward by appellate counsel.

over objection of counsel, of plaintiff's presentation of complicated case; no assessment of actual prejudice). It is arguable that within this general usage of the power, a court may properly intervene to correct and deter sufficiently opprobrious misconduct by trial counsel - officers of the court - even though no actual prejudice stemming from the misconduct can fairly be demonstrated under ordinary standards for reviewing the trial court's discretionary handling of the misconduct. Though the en banc majority does not say that this is the basis of its decision here, it seems to me implicit in what *is* said in the opinions giving the court's formal rationale. *See supra* note 10.

Reserving the question whether the misconduct of private counsel for prevailing parties should ever be an occasion for invoking supervisory corrective powers - a point on which I have grave doubt[13] - I am satisfied that in this case the misconduct does not. For two basic reasons.

In the first place, as developed in Part I, the existence of a sufficient degree of manifest injustice to justify an exercise of this extraordinary power is simply belied by the closely divided corporate judgment of the court on the en banc rehearing question and now, on the merits. Beyond this the remedy used to correct and deter the perceived injustice is itself afflicted with injustice in the overall perspective of this case.

The danger of giving an unjustly indiscriminate remedy is present in all exercises of supervisory jurisdiction. By definition, such exercises of judicial power are not focused upon the correction of specifically demonstrated prejudice to identified parties but upon the general regulation of conduct. That danger was present with a vengeance here and has been realized. A brief recapitulation of critical elements in the precedural development of the case illustrates this.

At the trial of these cases, the three plaintiffs had live, powerful claims for both compensatory and punitive damages arising from an almost incredible act of negligence on the part of Eastern's pilots. So powerful were these claims and so overwhelming the available

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[13] Because, in the absence of a determination that actual prejudice to a party probably resulted, this casts appellate courts in a professional conduct monitoring role for which, as earlier indicated, they simply are not equipped - either in fact-finding capability or in the limited range of sanctions available in appellate review of particular cases.

proof of negligence that - in what must surely be a relatively rare occurrence - this major commercial airline had conceded ordinary negligence entitling the plaintiffs to compensatory damages, leaving for trial on their claims only the amount of compensatory damages and the existence and amount of any punitive liability. Following three weeks of trial and seventeen hours of deliberation, a jury gave substantial compensatory awards to the plaintiffs, but denied them punitive damages.

The effect of the en banc decision is not only to strip these plaintiffs of their compensatory damage awards, but to send them back stripped as well of any opportunity to establish before the jury that reconsiders their compensatory awards their possible entitlement as well to punitive damages. This misfortune cannot be chalked up simply to the normal hazards of litigation and the inscrutability of jury processes. It stems rather from a circumstance that calls for relief if retrial of all the compensatory awards is to be the result of this appeal.

The compensatory awards are stripped because of the misconduct of counsel for these plaintiffs. But the loss of opportunity to attempt new proof of punitive liability results from a bizarre procedural twist in post-verdict proceedings when both Eastern's motion for new trial on the compensatory awards and the plaintiffs' motions for new trial on the punitive damage issue were being considered. That twist is not fairly chargeable either to plaintiffs or to their counsel and it may well have led to the cruelest injustice experienced so far by any parties to this action - in this matter, the plaintiffs. It came about in this way.

Despite the trial judge's finding, as trier-of-fact on a related, essentially congruent, non-jury issue, that "[Eastern's] crew were not simply inadvertent but rather were grossly negligent," *see Arnold I*, 681 F.2d at 190 n.1, 194 n.8, the judge declined to set aside as against the weight of the same evidence the jury's verdict against plaintiffs on their claims for punitive damages based on the alleged gross negligence of that crew.

Though it is, of course, difficult to be certain of the reasons for this apparent anomaly in the judge's rulings, it seems almost certain that they represent a practical assessment that the high-side compensatory awards on the one hand and the rejection of any punitive damage awards on the other reflected a jury "compromise." This is indicated both by the judge's reference to the possibility, *see id.* at 204 n.16, and by the next said twist in the ironic spiral into pro-

cedural disaster now underway for these completely faultless plaintiffs. Of course, if the assessment was of compromise verdicts, the proper technical response was to set both aside and order new trials on both compensatory and punitive damges. But in what now appears an effort to solidify the jury "compromise" as essentially a just one, the trial judge next admonished Eastern's attorneys on the record that if they successfully appealed the compensatory awards they would face on any new trial they won not only the compensatory damage claims but the punitive damage claims as well. *See id.* at 206 n.22. Although conditionally ordering such a consequence while declining to set aside the verdict did not lie within the judge's power, *see id.*, it is understandable that counsel for plaintiffs may reasonably and responsibly have assumed that he did have the power. Presumably acting on that assumption, counsel failed to take a cross-appeal, and the unfolding of plaintiffs' procedural misfortunes continued. Technically, of course, the absence of a cross-appeal precluded review of the judge's refusal to set aside the verdict denying punitive damages, and the panel so noted in affirming the two personal injury awards and remanding the Weston wrongful death claim. *See id.*

That technical impediment to cross-relief still exists of course. But it would be a singularly unjust withholding of the court's supervisory power not to grant that cross relief now as an adjunct to the substantial relief given Eastern in the process of eradicating the perceived injustice stemming from counsel's misconduct. The improvidence of the trial judge's ruling, with its inevitable lulling effect on plaintiffs' counsel, should not be charged to those plaintiffs even if the misconduct of their counsel is now to be. Ample precedent exists for giving this relief, notwithstanding the technical barrier, in an exercise of the same supervisory jurisdiction that is arguably the most defensible basis of the court's decision to benefit Eastern so handsomely for the dereliction of opposing counsel. *See, e.g., Tug Raven v. Trexler*, 419 F.2d 536, 548 (4th Cir. 1969); *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1127 & n.24 (D.C. Cir. 1976).

For this reason, I would at the least, if the compensatory damage awards are to be set aside, exercise this court's residual power to make a more just overall disposition in this tangled web of procedural misfortune. As a part of the remand, I would direct the trial judge to reconsider, on the record already made, the plaintiffs' motion to set aside the jury verdict finding Eastern not liable for punitive

damages. The judge's initial ruling on that motion was so obviously skewed by understandable concern to salvage verdicts possibly reflecting compromise, and his follow-up attempt to nail down the compromise so obviously misled counsel to plaintiffs' detriment, that this result seems to me compelled by the same considerations of justice that the en banc majority has concluded require setting aside the compensatory awards.

A final injustice involved in the remand for a new trial so handsomely and solely to Eastern's benefit should be noted. It further illustrates the improvidence of the specific decision to rehear en banc in these consolidated cases. And it underscores the unevenness that is likely to result from exercises of supervisory jurisdiction in multi-party, multi-claim cases where the effects of corrective action on all affected parties either are not, or cannot, be taken into account in shaping the remand.

This concerns the ironic plight of Eastern's insurers (Aetna) in the final denouement. In their consolidated appeals Aetna heavily relied, as did Eastern, on the prejudice allegedly caused it by misconduct of opposing counsel. *See Arnold I*, 681 F.2d at 192-94. Aetna's challenge on this score was rejected by the panel, as was Eastern's, but in the case of Aetna, the rejection was by unanimous decision of the panel. On Aetna's and Eastern's ensuing petitions for rehearing and suggestions for rehearing en banc, Eastern's suggestion for rehearing en banc of course carried by the narrowest of margins. At the same time, Aetna's petition for rehearing was being denied unanimously by the panel, and its suggestion for rehearing en banc failed when it prompted no request for consideration by any member of the court. Now Eastern, because of counsel misconduct, has secured a new trial limited to the determination of compensatory damages and has been freed of the potential for punitive liability, while Aetna's appeal based primarily on the same ground has ended in apparent failure, with the Supreme Court's recent denial of Aetna's petition for certiorari following our denial of its petition for rehearing. *Aetna Casualty and Surety Co. v. United States, cert. denied*, 51 U.S.L.W. 3748 (U.S. April 18, 1983) (No. 82-1177).

It is arguable, and indeed I have always believed, *see Arnold I*, 681 F.2d at 204, that Aetna's claim of prejudice from counsel misconduct was even less supportable on a careful record review than was Eastern's. But that was on the basis that, as Judge Bryan and I believed, neither was supportable. It is frankly inconceivable

to me - and I am sure to Aetna - that if Eastern's claim to relief on that score has sufficient merit to justify en banc corrective action, Aetna's had not enough to merit the same.[14] The record simply will not support the drawing of that fine a line between the relative positions of these parties on that matter.

On the overall record of these proceedings, Aetna could be excused if it wondered whether somehow its claim for appellate relief simply fell through the cracks of the en banc procedures in this court.[15] And any fair legal analyst would have to conclude that either this court's decision to rehear Eastern's appeal en banc or its failure to rehear Aetna's based upon the same ground was improvident. I have, of course, already indicated which of these I think was improvident. But one surely must have been.

Whatever its other consequences, this case reveals the special perils of indiscriminate decisions to rehear en banc and consequent indiscriminate remands in multi-claim, multi-party cases of this precedural complexity. The trial court's discretionary resolution of the admitted dilemmas created by trial developments remains the more defensible one, as the panel long ago concluded.

I am authorized to say that Judge Sprouse joins in this opinion.

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[14] Though Aetna is not before us on this rehearing en banc, the en banc majority, apparently recognizing the irony of the situation, has oddly resurrected, at the end of its opinion, that party's rejected appellate claim just long enough to declare summarily that, in contrast to Eastern's, it has no merit. *Arnold v. Eastern Air Lines*, _____ F.2d _____ (4th Cir. 1983) (en banc) (No. 80-1245, slip op. at 21). The suggestion is made that the revelation of insurance coverage could only has prejudiced Eastern. But that is not the prejudice claimed by Aetna. *See Arnold I*, 681 F.2d at 192.

[15] The crack is probably visible in the different views taken by the panel dissent and the en banc majority on the independent significance of the trial judge's consolidation ruling. The panel dissent thought that no prejudice to either Eastern or Aetna could be assigned independently to that ruling. The decision to rehear Eastern's appeal en banc and the contemporaneous decision not to rehear Aetna's presumably reflected that viewpoint. But that viewpoint has now been rejected by the en banc majority - too late to benefit Aetna.

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No. 83-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD ARNOLD, IV and FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF BY PETITIONERS RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK

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IN THE

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SUPPLEMENTAL BRIEF OF PETITIONERS RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK

Petitioners, Richard Arnold, IV and Francis C. Mihalek, pursuant to the provisions of Rule 16.6 of the Rules of the Supreme Court, herewith file this Supplemental Brief, bringing to the attention of this Court certain intervening matter which was not available at the time of the filing of the Petition on September 26, 1983. Petitioners urge upon this Court the consideration of the information contained in this supplemental brief in support of their plea that the Petition for Certiorari be granted.

On December 23, 1982, the United States Court of Appeals for the Fourth Circuit entered its Order (Petition for Certiorari, Appendix E, page 1e) granting the petition for rehearing and suggestion for rehearing *en banc* which had been made by Eastern Air Lines, Inc. ("Eastern"). That Order indicated that Circuit Judge Sam J. Ervin, III, a regular and active judge of the Fourth Circuit Court of Appeals, had recused himself from participation in the deci-

sion whether to grant rehearing *en banc* and from any consideration of the merits of the appeal in the event rehearing was granted.

The Order confirmed information which had been furnished to counsel for Petitioners during a telephone conversation with the office of the Clerk of the United States Court of Appeals for the Fourth Circuit at the time the December 23 Order was entered—that, for "personal reasons" not disclosed, Circuit Judge Ervin felt it appropriate to recuse himself from the appeal process. The nature of the "personal reasons" prompting the recusal was not revealed and no inquiry was made at that time by counsel for Petitioners, believing that that was a private matter and not one to which inquiry should be directed.

Circuit Judge Ervin is a long time resident of Morganton, North Carolina and was for many years one of the most respected Superior Court trial judges in this state. Circuit Judge Ervin also personally knew the Honorable James B. McMillan, the United States District Court Judge who conducted the trial of Petitioners' claims in the Fall of 1979. Both men had been contenders for the seat on the United States Court of Appeals to which Judge Ervin was appointed in May, 1980. Based upon his considerable experience as a trial judge prior to his elevation to the Court of Appeals, Judge Ervin would have had a valuable perspective on the issues of consolidation and counsel misconduct during final argument which were asserted by Eastern in the context of its appeal.

In October, 1983, and after docketing of the petition with this Court, the undersigned counsel for Petitioners was advised by a former clerk to a Judge of the United States Court of Appeals for the Fourth Circuit that the clerk's understanding was Judge Ervin had recused himself from this appeal because of the involvement in this case of his father, the Honorable Sam J. Ervin Jr., an attorney and former United States Senator from North Carolina. The information furnished to counsel for Petitioners was to the effect that former Senator Ervin had been involved in some capacity as counsel or consultant to Eastern in connection with the preparation of the brief submitted by Eastern to the three judge panel which initially heard the appeal.

Counsel for Petitioners immediately contacted Mr. H. Grady Barnhill, Jr. of the law firm of Womble, Carlyle, Sandridge & Rice, which has served as counsel for Eastern on this appeal. Mr. Barnhill was asked whether Senator Ervin had performed any function

in connection with the brief submitted by Eastern to the Fourth Circuit and whether Senator Ervin's role had been communicated to Circuit Judge Ervin. Senator Ervin was never identified in any capacity as counsel on any paper-writing filed by Eastern during the prosecution of its appeal. Mr. Barnhill requested time to confer with Senator Ervin and after doing so reported the following: After the Eastern brief had been prepared by Mr. Barnhill's law firm, it was submitted to Senator Ervin for his review and comment prior to filing with the United States Court of Appeals for the Fourth Circuit; Senator Ervin had been compensated for reviewing the brief. Counsel for Petitioners had previously been advised that the amount of that compensation was three thousand dollars, but Mr. Barnhill was not in a position to comment as to the amount of money paid. The delivery of the brief to Senator Ervin and his review of it had been undertaken at a time when Circuit Judge Ervin, the Senator's son, was a regular, active member of the United States Court of Appeals for the Fourth Circuit.

Counsel for Petitioner then contacted Circuit Judge Ervin and spoke with him by telephone on Thursday, November 3, 1983. Judge Ervin confirmed to the undersigned counsel that he had had a telephone conversation with his father, during the course of which the Senator had disclosed to his son that at the request of Eastern and its counsel, the Senator had reviewed the brief that was submitted by counsel for Eastern to the Fourth Circuit Court of Appeals. Judge Ervin was not personally familiar with the compensation arrangements between Eastern and his father. Upon learning of his father's participation as described above, Judge Ervin determined that he should disqualify himself from hearing anything in connection with the appeal by Eastern. Since Judge Ervin was not initially designated for the three judge panel, his decision to recuse himself did not become known until the petition for rehearing was filed.

Without directly attributing any improper motive or unethical conduct to anyone involved in the scenario described above, counsel for Petitioners respectfully suggests that these circumstances dramatically point up a potential for manipulative abuse of the appellate process in the Circuit Courts of Appeals relating to disqualification of judges. It is clear that the recusal of Judge Ervin was compelled by conduct of counsel for Eastern in retaining the services of this Judge's father at a time while the appeal was pend-

ing before the Fourth Circuit. A repetition of that conduct or the association of the former law firm of some other judge of the Fourth Circuit during the prosecution of an appeal would inevitably require the recusal of those otherwise qualified, impartial circuit judges merely upon the basis of their family ties or business associations.

The recusal of Judge Ervin under these highly unusual circumstances is significant to the issues presented to this Court in the petition now pending because it was his recusal which gave rise to the decision by the Fourth Circuit to exclude this regular, active judge from the calculation of the numerical majority of circuit judges necessary to order rehearing *en banc* under 28 U.S.C. §46(c). This Circuit Court has now established a precedent which will consistently reduce the number of affirmative votes necessary to order *en banc* rehearing whenever one or more circuit judges recuses himself, even where the basis of such recusal is procured by conduct of counsel for one of the parties.

Petitioners have urged upon this Court in their petition the premise that the recusal of a circuit judge in no way affects the provision of 28 U.S.C. §46(c) requiring the affirmative vote by "a majority of the circuit judges of the circuit who are in regular active service" in order to grant rehearing *en banc*. That interpretation is one which has been adopted by a clear majority of the circuit courts which have considered the impact of recusal upon the *en banc* rehearing process. It also serves the salutary purpose of discouraging any attempt to improperly influence the constituency of circuit judges eligible to vote upon the rehearing issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR EASTERN AIR LINES, INC.

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QUESTIONS PRESENTED

The first question framed by petitioners in fact presents two questions, both of which would need to be decided if petitioners were to prevail.

1. When a circuit judge shifts to senior status before the court of appeals takes action on a pending suggestion for rehearing en banc, is that judge to be counted in determining whether a "majority of the circuit judges . . . who are in regular active service" have "ordered" rehearing en banc pursuant to 28 U.S.C. § 46(c).

2. In determining whether a "majority of the circuit judges . . . in regular active service" have ordered rehearing en banc pursuant to 28 U.S.C. § 46(c), may the court of appeals decline to count a recused judge who is barred from voting on the suggestion for rehearing.

Petitioners' second question is ambiguously and broadly framed and may be recast as follows:

3. Did five members of the court of appeals abuse their discretion in voting to rehear the split decision of a panel when the dissenting member of the panel found that "egregiously unprofessional" misconduct of counsel for petitioners and the United States resulted in substantial injustice to respondent and affirmance of the district court's judgments would invite similar misconduct by other members of the bar.

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IN THE

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OCTOBER TERM, 1983

No. 83-553

RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR EASTERN AIR LINES, INC.

Respondent Eastern Air Lines, Inc., requests the Court to deny the petition for writ of certiorari, seeking review of the Fourth Circuit's en banc judgment in this case. The en banc opinions of the Fourth Circuit are now reported at 712 F.2d 899.

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 455 provides in pertinent part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceed-

ing in which his impartiality might reasonably be questioned.

* * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation. . . ."

* * * *

28 U.S.C. § 2071:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 47, Federal Rules of Appellate Procedure:

"Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Court."

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' statement of the case fails to discuss the opinions below and the order entered on December 23, 1982. We summarize the order and opinions here because they (1) demonstrate the soundness of the court of appeals' ruling on the first issue presented by petitioners and (2) set forth an independent ground for affirming the judgment below.

The original panel of the court of appeals affirmed two judgments for petitioners by a vote of two to one. On

June 16, 1982, respondent Eastern Air Lines filed a timely suggestion for rehearing en banc that was provisionally granted on December 23. The order granting rehearing requested the parties to brief the question whether rehearing en banc had been authorized by a "majority" of the judges in regular active service (Pet. App. 2e). The question arose because ten judges are authorized to sit on the Fourth Circuit; five judges had voted to rehear; four judges had voted to deny rehearing; one of the four judges voting to deny (Butzner, J.) had cast his vote while on regular active service but took senior status almost two months before the suggestion for rehearing was acted on; and one judge (Ervin, J.) had recused himself (Pet. App. 2e, 21f).[1] After the "majority" issue was fully briefed and the entire case was reargued, the en banc court ruled by a vote of six to two that "a majority of the circuit judges who are in regular active service" had voted for rehearing (Pet. App. 2f).[2]

1. *The Majority Opinion.* The majority opinion "purposely" avoided deciding whether Judge Butzner's shift to senior status, before rehearing en banc was ordered by the court, reduced the number of judges "in regular ac-

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[1] The court of appeals' order suggested that the parties consider related decisions and authorities including *Zahn* v. *Int'l Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd on other grounds*, 414 U.S. 291 (1973); and *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963). (Pet. App. 2e.)

[2] Nine judges sat during reargument en banc. One judge, Bryan, J., was a senior judge who had participated as a member of the original panel. He voted on the merits of the appeals. He did not vote on the question of whether the "majority" requirement of Section 46(c) had been met because senior circuit judges are barred from voting on suggestions for rehearing en banc (Pet. App. 2f). Judge Butzner, who initially voted against rehearing, did not sit on the en banc court because he had taken senior status. See 28 U.S.C. § 46(c).

All nine of the assembled judges voted on the merits, and five of those judges concluded that the judgments of the district court should be reversed.

tive service" from ten to nine (Pet. App. 4f). Instead, the court found that only five votes were needed for a "majority" because the recused, non-voting judge (Ervin, J.) should not be counted as a judge in regular active service in this particular case (Pet. App. 7f).

The court pointed out that the second sentence of 28 U.S.C. § 46(c) provides that "[a] court in banc *shall* consist of *all* circuit judges in regular active service" (emphasis added). If a recused judge were encompassed in the phrase "judges in regular active service," that would mean that he should sit on the en banc court notwithstanding his recusal. Such a reading of Section 46(c) would defeat the purpose of 28 U.S.C. § 455, which provides: "Any . . . Judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." Hence, the majority opinion concluded that the phrase "judges in regular active service," found in the second sentence of Section 46(c), was not intended to include recused judges. Such judges, by statutory mandate, are "out of service" in cases where they must recuse themselves. (Pet. App. 6f-7f.)

This phrase—judges "in regular active service"—also appears in the first sentence of Section 46(c), which specifies that rehearing en banc may be ordered by a "majority" of judges "in regular active service." The court below concluded that this phrase should have the same meaning in both sentences of Section 46(c) and thus a recused judge should not be counted in determining whether a majority of judges "in regular active service" has ordered rehearing en banc. (Pet. App. 7f.)

The court of appeals found that its reading of Section 46(c) was buttressed by the ordinary understanding of the term "majority" as defined in H. Robert, *Robert's Rules of Order* 339 (Section 43) (S. Robert ed. 1970): "[I]t means more than half of the votes cast by persons legally entitled to vote, *excluding blanks or abstentions*,

at a regular or properly called meeting at which a quorum is present" (emphasis added). (See Pet. App. 9f-10f.)[3]

2. *The Concurring Opinion.* Judge Hall agreed with the majority's rationale and added a "more narrow and equally compelling" ground for holding that the en banc court was properly convened (Pet. App. 21f). He noted that Judge Butzner took senior status 52 days before the court acted on the suggestion for rehearing en banc. Thus, there were fewer than 10 judges "in regular active service" when rehearing was "ordered" by the court, and five of those judges had voted to rehear. Relying on *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688-89 (1960), Judge Hall concluded that it was irrelevant that Judge Butzner had cast a vote to deny rehearing while he was still in regular active service because the validity of a vote to grant or deny rehearing must be determined on the date that the court enters its order acting on the suggestion for rehearing. (Pet. App. 22f.)[4]

3. *The Concurring and Dissenting Opinion.* Judge Widener, joined by Judge Phillips, concluded that the five votes to rehear did not "consitute a majority of ten" (Pet. App. 14f). This opinion implicitly counts Judge Butzner as a judge in regular active service but does not expressly deal with Judge Butzner's shift to senior status. As to the recusal issue, Judge Widener said that "the *Shenker* case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does and it did not do so . . ." (Pet. App. 16f). He noted that a

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[3] The majority opinion also observes that "we do not, by our decision today preclude a possible change in practice, brought about by adoption [by us] of a rule of general applicability" (Pet. App. 4f).

[4] Judge Hall also pointed out that the Fourth Circuit, sitting en banc, did not tally Judge Craven's vote concurring in a draft opinion when Judge Craven died before the court's decision was announced. *Mayor & City Council of Baltimore* v. *Matthews*, 571 F.2d 1273 (4th Cir.), *cert. denied*, 439 U.S. 862 (1978).

majority of other circuits count recused judges, and endorsed their position because it would help to limit the number of en banc proceedings and would help to ensure "'uniformity and continuity'" in the decisions of the court (Pet. App. 18f).

REASONS FOR DENYING THE WRIT

I. PETITIONERS' FIRST QUESTION

A. Two Decisions Of This Court Provide An Independent Basis For Affirming The Judgment Below Even If Petitioners Were To Prevail On The Question They Present.

To establish that five votes to rehear did not constitute a "majority" of the judges in "regular active service," petitioners must show (1) that a recused judge must be counted as a "judge in regular active service" and (2) that Judge Butzner must be counted even though he was not "in regular active service" when the suggestion for rehearing en banc was acted on by the court of appeals.[5] Two decisions of this Court, however, make clear that Judge Butzner's vote to deny rehearing should not be counted. Thus, there is a well-established, independent ground for affirming the judgment below that renders petitioners' first question a futile exercise, unnecessary to the proper resolution of this case.

Moody v. *Albemarle Paper Co.*, 417 U.S. 622 (1974), holds that Section 46(c) bars senior judges from voting

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[5] Petitioners do not contend that vacancies should be counted. The dissenting opinion below, which in other respects supports petitioners, notes that "vacant judgeships" do not count "one way or the other" (Pet. App. 16f n.2). The First Circuit, moreover, has held that a "vacancy" is not "a judge in regular active service" within the meaning of Section 46(c). Thus, where four judgeships were authorized, but one was vacant, a vote of two to one constituted a majority of the judges in regular active service. *United States* v. *Martorano*, 620 F.2d 912 (1st Cir. 1980) (en banc), *cert. denied*, 449 U.S. 952 (1980).

on suggestions to rehear en banc. *United States* v. *American-Foreign Steamship Corp., supra*, 363 U.S. 685, holds that when senior judges are not competent to rule on a matter, the status of a participating judge is determined at the time that the court of appeals' decision is entered and not at some earlier stage when the judge was still in regular active service. In *American-Foreign Steamship*, the Second Circuit ordered rehearing en banc and fresh briefs. Judge Medina took senior status after the case was submitted to the Second Circuit sitting en banc, but before it was decided by the en banc court. He continued to participate in the case while on senior status. This Court held that Section 46(c) requires that en banc cases be "determined" by judges in regular active service, and such a case is "determined" only when the decision is issued, not when the case is argued, or when it is submitted on brief, or when some other interim step is taken. 363 U.S. at 688, 690. Because Judge Medina was on senior status when the case was "determined," his vote could not be counted. By the same token, in this case rehearing en banc was "ordered," within the meaning of Section 46(c), on the date that the order was issued (December 23, 1982), and by then Judge Butzner had been in senior service for 52 days. Accordingly, his vote should not be counted.

The result reached in *American-Foreign Steamship* is sound. Initial votes should not be treated as final votes so long as a matter continues to pend. During that time a judge should be free to consider the views of other members of the court and to reconsider his own position. This Court, we understand, treats all of its decisions as tentative and subject to reconsideration by any justice until the moment that the Chief Justice releases the decision. Barrett McGurn, "Public Information, The United States Supreme Court," 69 A.B.A.J. 40, 45 (1983). In the case of circuit judges who shift from regular status to senior status, there is even less reason to freeze their

initial votes when a suggestion for rehearing continues to pend beyond their retirement date. Senior judges are ordinarily barred from participating in any later en banc proceeding, see 28 U.S.C. § 46(c); thus their votes should not impose an en banc proceeding on regular active judges who are evenly split, or foreclose an en banc proceeding sought by a majority of the judges who remain in regular active service.[6]

In short, if certiorari were granted, the recusal issue presented by petitioners would likely be mooted because there are two decisions of this Court that support affirmance on a different ground.

B. The "Conflict" Among The Circuits Represents A Permissible Difference Among The Courts Of Appeals On A Matter Of Internal Governance.

Petitioners contend that the decision below is in direct conflict with the Sixth Circuit's decision in *Clark* v. *American Broadcasting Co.*, 684 F.2d 1208, *cert. denied*, 103 S.Ct. 1433 (No. 82-1288) (March 21, 1982) (Pet. 10). In *Clark*, the Sixth Circuit counted a recused judge in determining whether a majority of the court had voted to rehear; in this case the Fourth Circuit did not count the recused judge in making that determination.[7] The

[6] Additional problems are invited if a court of appeals counts votes of judges who shift to senior status before a suggestion for rehearing en banc is acted on by the court. If, for example, the vacancy created by the retirement of a judge is filled while the suggestion for rehearing is pending, the new judge is plainly a "judge in regular active service" and is eligible to vote on the suggestion.

[7] In *Clark*, the American Broadcasting Company (ABC) was denied rehearing en banc by a vote of five for, four against, and one recused. ABC did not ask the Sixth Circuit to reconsider that denial on the ground that the recused judge should not be counted. (Respondent's Brief in Opposition, No. 82-1288, p. 1.) Instead it raised the issue in this Court by a petition for certiorari that was denied. Now ABC has petitioned this Court for a writ of mandamus to correct the judgment of the Sixth Circuit in light of the Fourth

rules, internal operating procedures and orders of other courts of appeals reflect similar variations in counting or not counting recused judges.[8]

Petitioners recognize that the issue they present raises a question of discretion, but they assert that "[s]urely the discretion vested in the circuits to determine for themselves the format for the exercise of the *en banc* power is not so broad as to permit such diametrically opposed interpretations of § 46(c) to co-exist in a unitary system of federal justice" (Pet. 13). In assessing this issue, it is important for the Court to distinguish between

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Circuit's ruling in this case. (No. 83-575.) ABC still has not afforded the Sixth Circuit the opportunity to reconsider its ruling in light of this case, and thus the conflict may be largely due to ABC's repeated efforts to have this Court decide the issue in the first instance.

[8] At least four circuits decline to count recused judges in determining if a majority has voted to rehear: *Fourth Circuit*, policy established in the instant case; *Seventh Circuit*, "Statement of Internal Operating Procedures," § 5(d)(1); *Eighth Circuit*, Rule 16(a) of its rules; and *Ninth Circuit*, "Internal Operating Procedures," § II.K.(2)(d). It should be noted that the Seventh Circuit recently changed its position to accord with the Fourth Circuit. Compare *Porter Chapter of Izaak Walton League* v. *Atomic Energy Commission*, 515 F.2d 513, 533 (7th Cir.), *rev'd on other grounds*, 423 U.S. 12 (1975), with "Statement of Internal Operating Procedures," § 5(d)(1): "A simple majority of the voting active judges is required to grant a rehearing in banc."

At least four circuits count recused judges in determining whether a majority has voted to rehear: *District of Columbia Circuit*, "Handbook of Practice and Internal Procedures," p. 73 (1978); *Second Circuit*, *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1040, *aff'd on other grounds*, 414 U.S. 291 (1973); *Third Circuit*, *Curtiss-Wright Corp.* v. *General Electric Co.*, 599 F.2d 1259, 1265 (1979), *rev'd on other grounds*, 446 U.S. 1 (1980); and *Sixth Circuit*, *Clark* v. *American Broadcasting*, *supra*.

It appears that five circuits either have not faced the recusal issue or have not indicated their position in published opinions or manuals of internal operating procedures. Those circuits are the First, Fifth, Tenth, Eleventh, and Federal Circuits.

the rights secured to litigants by Section 46(c) and the discretionary power conferred on courts of appeals by that section.

This Court has twice held that Section 46(c) creates only two rights for a litigant—"the right to know the administrative machinery that will be followed [in deciding whether to grant rehearing] and the right to suggest that the *en banc* procedure be set in motion in his case." *Shenker* v. *Baltimore & Ohio Railroad*, 374 U.S. 1, 5 (1963); *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 250 (1953).[9] Neither of these rights is implicated in the "conflict" between the Sixth Circuit and the Fourth Circuit. Neither Circuit has failed to advise litigants of the means whereby a majority may order rehearing en banc or failed to provide the litigant with the opportunity to suggest rehearing. See *Moody*, *supra*, 417 U.S. at 625 n.3 and Fed. R. App. P. 35(b). Indeed, the petitioners do not contend that the court of appeals has improperly restricted their right to suggest rehearing; on the contrary, they complain that the court below has been too generous in granting rehearing en banc (Pet. 17-18). Thus, there is no reason for the Court to review this case in order to protect the litigants' rights under Section 46(c); their rights under that statute have already been clearly defined by this Court, and there is no conflict among the circuits respecting those rights.

The conflict that petitioners urge this Court to resolve —whether a court may decline to count a recused judge in determining whether a majority of the court favors rehearing—is a matter of internal governance, left to the discretion of each court of appeals. *Cf. Shenker*, *supra*,

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[9] In *Western Pacific*, this Court said that "§ 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further." 345 U.S. at 250.

374 U.S. at 5. In enacting Section 46(c), Congress did not undertake to prescribe special rules for determining if the "majority" requirement of Section 46(c) is met when, for example, a circuit judge is disqualified, voluntarily abstains though present, or fails to vote because the judge is temporarily ill, on vacation, or sitting by designation in another court.[10] The individual courts of appeals were left to work out such nuances.[11] "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Western Pac., supra*, 345 U.S. at 259. "[T]he statute does not compel the court to adopt any particular procedure governing the exercise of the [en banc] power. . . ." *Id.* at 267. "A court may take steps to use the *en banc* power sparingly. . . ." *Id.* at 261. Thus, the "conflict" among the circuits that petitioners decry is a permissible "conflict" among the courts of appeals reflecting the "independence within the area of their authority." *Western Pac.*, 345 U.S. 247, 268-69 (Opinion of Frankfurter, J.). Such a conflict plainly does not warrant review by this Court.

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[10] In Section 46(d) Congress has defined a quorum for en banc review as a majority of "the number of judges authorized to constitute a court." The quorum requirement thus sets the outer acceptable limits on rehearings en banc when a substantial number of judges are recused or otherwise prevented from participating in an en banc proceeding. Congress has also provided that senior judges may not vote on suggestions for rehearing en banc by providing that rehearing en banc may be ordered only by judges "in regular active service." 28 U.S.C. 46(c). Congress has not required that in other respects the en banc practices of the courts of appeals shall be uniform. In this regard, we note that each circuit is authorized to "make and amend rules governing its practice" unless those rules are inconsistent with the Federal Rules of Appellate Procedure or Acts of Congress. Rule 47 Fed. R. App. P.; 28 U.S.C. § 2071.

[11] The special committee that drafted Section 46(c) "assimilated the power to sit *en banc* to discharge . . . of housekeeping functions" such as appointing clerks and fixing the times when court shall be held. *Western Pac., supra*, 345 U.S. at 256.

In any event, the "conflict" cited by petitioners seems to be more the result of inadvertence than deliberate decision, and it may be worked out in the future. The decision below appears to be the first one in which a court of appeals, following briefing, has written opinions explaining why recused judges should or should not be counted in determining whether a "majority" of judges in "regular active service" favor rehearing en banc. The only other opinion of which we are aware supporting a result contrary to that reached below is the concurring opinion of Judge Mansfield in *Zahn* v. *International Paper Co.*, *supra*, 469 F.2d at 1041, but as the majority below pointed out, Judge Mansfield's opinion did "not allude to the language of the second sentence in § 46(c) or to the problems of directly conflicting meanings assigned to the same language, appearing cheek by jowl in adjacent sentences in a single statute" (Pet. App. 8f). Now that the court below has pointed out these and other problems with including recused judges in the tally, other courts may reasonably be expected to reexamine their positions in light of the Fourth Circuit's decision. Accordingly, even if this were a matter not within the internal governance of the courts of appeals, it would be appropriate for this Court to wait until there is a conflict between reasoned opinions of the courts of appeals, as opposed to a conflict between unexplained orders, internal procedures, and court rules.

C. There Is No Conflict Between The Ruling Below And This Court's Ruling In *Shenker*.

Petitioners state that the ruling below "is arguably in conflict with this Court's holding in *Shenker* v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963)" (Pet. App. 8). As the phrase "arguably in conflict" forebodes, *Shenker* deals with a problem that is conceptually different from the issue presented here. In *Shenker* four judges from the Third Circuit voted to rehear, two voted to deny, and two "abstained." The suggestion for rehearing was deemed

by the Third Circuit to have failed, and this Court affirmed. 374 U.S. at 4-5. Thus, *Shenker* can be read to hold that, in determining whether a "majority" has voted for rehearing, it is *permissible* to count judges who voluntarily abstain from voting. But as the court below pointed out, *Shenker* deals with "abstainers"—*i.e.*, judges who are "voluntary non-voters"; this case deals with a "disqualified judge who is under a binding compulsion not to vote" (Pet. App. 5f n.3). In *Shenker* this Court had no occasion to consider, much less rule on, the effect of recusals required by 28 U.S.C. § 455; thus, that case simply cannot be read to require the courts of appeals to count judges who are ineligible to vote because of an Act of Congress.

Moreover, *Shenker* does not even set forth an unequivocal rule relating to abstentions. In *Shenker* the Court said that under Section 46(c) the Third Circuit was obliged to provide the litigants with "administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. The Court approved the Third Circuit's "practice" of submitting "every petition for rehearing . . . to every member of the court" without requiring each judge "to enter a formal vote on the petition." *Id.* The Court's holding is a narrow one:

> "Such a *procedure* is clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5 (emphasis added).

In short, *Shenker* plainly does not control the issue that the Fourth Circuit decided in this case.

II. PETITIONERS' SECOND QUESTION

The second question presented by petitioners is plainly unworthy of review. Petitioners urge that it was an abuse of discretion for the court of appeals to rehear this

case because the case did not present an intra-circuit conflict or question of exceptional legal importance (Pet. 17-18).

The record presented to the court of appeals revealed a sound reason for the court to convene en banc—namely, to protect the integrity of the fact-finding process in the Fourth Circuit. This case was tried before a jury for the purpose of determining petitioners' damages. At trial, counsel for petitioners and the United States engaged in multiple instances of flagrant misconduct. The nature and extent of that misconduct is set out in Judge Murnaghan's dissent from the panel's opinion (Pet. App. 31d-37d). Notwithstanding the misconduct of counsel, two members of the original panel voted to affirm the judgments; but even they found that counsel's conduct was "improper" and "in substantial part inelegant, tasteless, offensive, arguably violative of professional standards and . . . irresponsibly threating to any verdicts [for their clients]" (Pet. App. 10d).

The dissenting member of the panel concluded that the closing arguments of the Government and petitioners were "egregiously unprofessional" (Pet. App. 37d). He expressed shock that Eastern would be required to pay damages "extracted from the jury through resort to such offensive tactics" (Pet. App. 38d). He was concerned not only with the unfairness of this particular trial but with the ramifications that affirmance would have on the bar at large in the Fourth Circuit, especially personal injury lawyers who were retained on contingent fee contracts (Pet. App. 38d). The prospect of reaping huge damage awards and contingent fees by improper arguments to a jury needed to be held in check by the prospect that such improper conduct would result in a new trial. Affirmance of the judgment for petitioners was, in Judge Murnaghan's view, "an open invitation to outrageous misbehavior by [other] trial lawyers" (Pet. App. 37d). The court of appeals subsequently granted rehearing en banc

and "largely" relied on the "rationale" of the dissenting opinion in reversing the judgments (Pet. App. 10f).[12] Thus, there is no basis for petitioners' notion that the court of appeals abused its discretion "such as to vitiate the judgment rendered by the Circuit Court" (Pet. 3).

Moreover, the issue raised by petitioners' second question is simply not an appropriate one for plenary review by this Court. "[V]oting *whether to rehear* a case in banc . . . is essentially a policy decision of judicial administration." *Moody, supra*, 417 U.S. at 627. No rule or statute was violated by five judges in this case when they decided to vote for rehearing en banc. In tendering their second question, petitioners do not contend that these five judges violated the requirements of 28 U.S.C. § 46(c) or any other statute. They do suggest, to be sure, that granting rehearing was contrary to Rule 35(a), Fed. R. App. P., but that rule merely states that rehearing en banc "ordinarily will not be ordered" unless one of two conditions is met. The use of the word "ordinarily" is explicit recognition that rehearing en banc may be granted in other circumstances.

In the final analysis, the issue of whether to grant rehearing en banc in a given case must rest in the sound judgment of the judges of the courts of appeals. The question of whether a court of appeals should grant rehearing en banc—like the question whether this Court should grant certiorari—is heavily dependent on the nature of the individual case and many other circumstances. At best there can only be general guidelines for selecting those cases warranting rehearing en banc, and the circuit

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[12] As we read the opinions, five judges voted to reverse because of the improper conduct by counsel and the erroneous consolidation of Eastern's case with that of its insurers (Pet. App. 2f, 10f-13f). One member of the majority concluded that the improper conduct was prejudicial, but, standing alone, was not an independent ground for reversal because there were insufficient objections (Pet. App. 13f).

judges' application of the guidelines in a given case is pregnant with the potential for dispute.[13] If this Court were to hold that the Court of Appeals abused its discretion in granting rehearing en banc, numerous other petitioners would claim that the courts of appeals had either improperly granted or denied rehearing en banc in their particular cases. Unless a petitioner can demonstrate that the decision to rehear a case has violated a statute or rule, that decision should be viewed as a matter left to the discretion of the courts of appeals. "For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals," *Shenker, supra*, 374 U.S. at 5.

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[13] Petitioners urge this Court "to provide guidance to the circuit court's concerning the limited proper use of the *en banc* authority and to sanction misuse of that power" (Pet. 23). But there is nothing to demonstrate that the courts of appeals are overutilizing their en banc authority. On the contrary, petitioners' statistics show that, in 1980, less than one percent of all appeals filed (0.28%) were heard en banc (Pet. 17 n.10). As petitioners say, these statistics "illustrate" the "degree to which *en banc* rehearings are disfavored" and "[t]here is now general agreement among the circuits that the 'extraordinary' cases meriting *en banc* treatment are those which involve issues likely to impact upon many other cases. . . ." (Pet. 17 & n.10).

CONCLUSION

Neither question presented by petitioners poses an important issue of law that needs to be resolved by this Court, and accordingly the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1983

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No. 83-553

IN THE

Supreme Court of the United States

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Petitioners,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR EASTERN AIR LINES, INC.

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November 22, 1983

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1. As a matter of fairness to Senator Ervin and Judge Ervin, respondent files this supplemental brief to make clear that no attempt was made in this case to influence the composition of the *en banc* court. In that regard, even petitioners disavow any intention of "directly attributing any improper motive or unethical conduct to anyone involved in the scenario" they describe. Pet. Supp. 3.

Senator Ervin is highly respected among North Carolina lawyers as an able advocate. Prior to his years of

service in the United States Senate, he served as both a trial and appellate judge in North Carolina, being an associate justice of the North Carolina Supreme Court from 1948 to 1954. After his retirement from the United States Senate in 1975, he returned to the private practice of law in Morganton, North Carolina, where he still practices today.

In the instant case Eastern was represented on appeal by the firm of Womble, Carlyle, Sandridge & Rice. Since approximately 1923 there has been a close professional relationship between Senator Ervin and the Womble, Carlyle firm during those periods when the Senator has been engaged in private practice. The earliest recollection of this relationship, among those who are still alive, dates back to the 1920s when the Senator and his father frequently consulted with senior partners of Womble, Carlyle on legal matters. Since 1975, when the Senator resumed private practice, he has been associated with Womble, Carlyle in major legal matters. One of these matters was being briefed by Senator Ervin and Womble, Carlyle to the Supreme Court of North Carolina in September 1980 when the Senator was asked by Womble, Carlyle to review its draft of appellant's initial brief to the Fourth Circuit in this case. The firm requested Senator Ervin to make this review because of his unique experience and ability as an advocate. He concluded his participation in the case in November 1980.

Commencing in March 1981 all parties filed their briefs in the court of appeals; on June 2, 1981, the case was argued to a three-judge panel (Bryan, Phillips and Murnaghan, JJ.); and the panel decided the case on June 4, 1982. In light of the panel's opinion and especially the dissenting opinion of Judge Murnaghan, Eastern filed a suggestion for rehearing *en banc* on June 16, 1982, and Circuit Judge Ervin abstained from voting on the suggestion.

In 1980, at the beginning of the appellate process, no lawyer could have reasonably foreseen how Judge Ervin's recusal could bear on the ultimate outcome of this case in the court of appeals. That would have required counsel to hypothesize that the panel, which was then unknown, would rule against Eastern; that the panel's opinions would provide a sound basis for a suggestion for rehearing *en banc*; that the vote on the suggestion for rehearing would be close; that Judge Ervin, faced with the hypothesized opinion and the hypothesized suggestion for rehearing *en banc*, would vote against rehearing rather than voting for it; and that the Court of Appeals, faced with the issue for the first time, would decide that recused judges should not be counted in determining whether a "majority" of the court had voted for rehearing *en banc*.

2. Petitioners suggest that the "potential for manipulative abuse" of *en banc* procedures can be discouraged by a ruling that recused judges must be counted when the court of appeals determines whether a majority has voted for rehearing. Pet. Supp. 3, 4. The fallacies of this position are clear. First, petitioners unrealistically assume that counsel can determine in advance how a judge will vote on a suggestion for rehearing and can make the associations necessary to recuse that judge. Second, the hypothetical evil that petitioners conjure up would remain if recused judges are counted for purposes of determining whether a "majority" has voted to rehear. Under petitioners' proposed rule, if one judge recused himself in a circuit having ten judges, the party seeking rehearing *en banc* would need to muster two-thirds of the votes cast—*i.e.*, six out of nine votes. In that event, the party opposing rehearing would have an incentive to reduce the chances of rehearing *en banc* by making an association that would recuse one of the ten judges. Thus, the "potential for abuse" divined by petitioners is

irrelevant to any possible construction of 28 U.S.C. § 46(c).

Respectfully submitted,

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